

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION

AMERICAN WHITEWATER, AMERICAN CANOE )  
ASSOCIATION, GEORGIA CANOEING )  
ASSOCIATION, ATLANTA WHITEWATER CLUB, )  
FOOTHILLS PADDLING CLUB, WESTERN )  
CAROLINA PADDLERS, Joseph C. STUBBS, Kenneth )  
L. STRICKLAND, and Bruce A. HARE, )

Plaintiffs, )

v. )

THOMAS TIDWELL, in his official capacity as Chief of )  
the United States Forest Service; the UNITED STATES )  
FOREST SERVICE, an agency of the United States )  
Department of Agriculture; ELIZABETH AGPAOA, )  
Regional Forester, Southern Region, United States Forest )  
Service; MONICA J. SCHWALBACH, Acting Forest )  
Supervisor, Francis Marion and Sumter National Forests; )  
MARISUE HILLIARD, Forest Supervisor, National )  
Forests in North Carolina; GEORGE M. BAIN, Forest )  
Supervisor, Chattahoochee-Oconee National Forests; )  
THOMAS VILSACK, in his official capacity as )  
Secretary of the United States Department of Agriculture; )  
the UNITED STATES DEPARTMENT OF )  
AGRICULTURE, )

Defendants. )

Civil Action No. 8:09-2665-RBH

**COMPLAINT**

**INTRODUCTION**

Plaintiffs bring the instant action because the United States Department of Agriculture (“USDA”), through the United States Forest Service (“USFS”), has unlawfully infringed on Plaintiffs’ federally-protected right to recreate on the Chattooga Wild and Scenic River (the

“Chattooga”) upstream of South Carolina Highway 28 (the “Headwaters”) in hand-powered canoes and kayaks:<sup>1</sup>

- The Wild and Scenic Rivers Act (“WSRA”) requires that administering agencies “protect and enhance” the “values” that caused a river to be included in the National Wild and Scenic Rivers System;<sup>2</sup> and
- Congress specifically identified canoe and kayak recreation on the Chattooga Headwaters as a value that caused the river to be included in the National Wild and Scenic Rivers System;<sup>3</sup> yet
- The USFS currently bans all floating on the Headwaters (with one *de minimus* exception).

In addition to violating the WSRA,<sup>4</sup> Defendants’ actions violate the Wilderness Act<sup>5</sup>, the Multiple-Use Sustained-Yield Act,<sup>6</sup> the Forest and Rangeland Renewable Resources Planning Act,<sup>7</sup> the National Forest Management Act<sup>8</sup> and its implementing regulations,<sup>9</sup> the National

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<sup>1</sup> Plaintiffs will use the term “floating” throughout this Memorandum to refer to all types of non-commercial, non-motorized methods of river floating or boating, including kayaking, canoeing and rafting.

<sup>2</sup> 16 U.S.C. § 1281.

<sup>3</sup> Sen. Report No. 93-738 at 3008, 3010 (1974). (COMPLAINT EX. 1)

<sup>4</sup> 16 U.S.C. § 1271 *et seq.*

<sup>5</sup> 16 U.S.C. §§ 1131 *et seq.*

<sup>6</sup> 16 U.S.C. § 528 *et seq.*

<sup>7</sup> 16 U.S.C. §§ 1600-14.

<sup>8</sup> 16 U.S.C. § 1600 *et seq.*

<sup>9</sup> 36 C.F.R. 219.1-219.29.

Environmental Policy Act<sup>10</sup> and its implementing regulations<sup>11</sup>, the Administrative Procedures Act (“APA”),<sup>12</sup> and other applicable statutes and regulations.

Each of these violations is addressed in turn below. These unlawful actions are causing irreparable damage to the natural Plaintiffs, the members of the Plaintiff organizations, the floating public and the public at large. For the reasons set forth below, this court should order Plaintiffs’ requested relief, including entering temporary, preliminary and ultimately final injunctions that restore the ability of paddlers to float the Chattooga Headwaters as was done for at least 250 years prior to the unlawful actions of the USFS and to bring management of the Headwaters in congruity with management of every other federally managed and Wild and Scenic river in the United States.

Plaintiffs further seek an award of costs and attorneys’ fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412.

## **I. JURISDICTION, VENUE AND ENDORSEMENT OF DIVISION**

1. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as defendant), and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her duty).

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<sup>10</sup> 42 U.S.C. §§ 4321-4370.

<sup>11</sup> 40 C.F.R. 1500-08.

<sup>12</sup> 5 U.S.C. §§ 551-706.

3. In addition, the APA gives this Court jurisdiction to hear the claims in Plaintiffs' Complaint. 5 U.S.C. §§ 551-96, 601-12 and 701-03. Judicial review is appropriate under 5 U.S.C. § 701 et seq.

4. As a basis therefore, Plaintiffs allege that all actions challenged in the Complaint are final actions for purposes of review and that Defendants are taking actions that are arbitrary and capricious, that are abuses of discretion, and that are not in accordance with applicable law.

5. In addition, Defendants' failures and refusals to take certain actions as described herein constitute agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1) and (2). The complained-of conduct creates an actual, justiciable controversy.

6. Venue is properly vested in this Court by 28 U.S.C. § 1391(e) because Defendants are a federal agency and officers thereof and a substantial part of the events or omissions giving rise to the claims herein occurred in this district. In particular, a substantial part of the section of the river at issue in this Complaint is situated in the Anderson Division of the District of South Carolina, thus undersigned endorses that the Anderson Division is the proper forum for this case to be assigned.

7. Declaratory relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2201. Injunctive relief is appropriate under 5 U.S.C. § 703, 28 U.S.C. § 2202 and Fed. R. Civ. P. 65.

8. A temporary restraining order and a preliminary injunction are necessary to prevent further unlawful agency action. Plaintiffs have a substantial likelihood of success on the merits; there is a substantial risk of irreparable harm absent an injunction; the irreparable harm threatened is greater than that which could be caused by an injunction; and the public would be served by an injunction.

## **II. THE PARTIES**

### **A. Plaintiffs**

9. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

10. Plaintiff American Whitewater is a nonprofit 501(c)(3) corporation organized under the laws of Missouri. Its principal place of business is Western Carolina University, 1101 Outreach Center, Cullowhee, North Carolina, 28723. Since 1954, American Whitewater has been dedicated to restoring rivers to their natural condition, eliminating water degradation, improving public land management and -- as in this case -- protecting public access for responsible recreational use.

11. A nationwide organization, American Whitewater represents individuals, families and organizations having a combined membership of approximately 6,700 members and more than 100 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

12. American Whitewater's members have used, and but for the unlawful closure would be currently using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

13. American Whitewater has standing in this case.

14. Plaintiff American Canoe Association is a nonprofit 501(c)(3) corporation organized under the laws of New York. Its principal place of business is 7432 Alban Station Blvd., Suite B-232, Springfield, Virginia 22150. Since 1880, the American Canoe Association has been dedicated to promoting canoeing, kayaking, and rafting as wholesome lifetime recreational activities. The American Canoe Association provides a variety of worthwhile programs and public services in such areas as: event sponsorship, safety education, instructor certification, waterway stewardship, water trails, paddler's rights and protection, and public information campaigns.

15. A nationwide organization, the American Canoe Association represents individuals, families and organizations having a combined membership of approximately 50,000 individual members and more than 300 local affiliate paddling clubs and organizations, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

16. American Canoe Association's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

17. The American Canoe Association has standing in this case.

18. Plaintiff Georgia Canoeing Association is a nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 7023, Atlanta,

Georgia 30357. The Georgia Canoeing Association promotes conservation, environmental and river access issues as well as boating safety and skills development. Since 1966, the Georgia Canoeing Association has been a member-operated paddling club representing individuals, families and organizations having a combined membership of approximately 2,000 individual members, the large majority of whom live in Georgia and many of whom regularly float the open portions of the Chattooga WSR, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

19. Georgia Canoeing Association's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

20. The Georgia Canoeing Association has standing in this case.

21. Plaintiff Atlanta Whitewater Club is a member-operated nonprofit 501(c)(3) corporation organized under the laws of Georgia. Its principal place of business is P.O. Box 11714, Atlanta, Georgia 30355. The Atlanta Whitewater Club was founded in 1978 by a dedicated group of Atlanta's kayakers, canoeists, and rafters to provide educational services and events that increase the enjoyment, safety, and skills of paddlers at every level of the sport and to protect the environment.

22. The Atlanta Whitewater Club has a combined membership of approximately 110 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

23. Atlanta Whitewater members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

24. The Atlanta Whitewater Club has standing in this case.

25. Plaintiff Western Carolina Paddlers is a member-operated paddling club based in Asheville, North Carolina. The Western Carolina Paddlers can be reached at P.O. Box 8541, Asheville, North Carolina 28814. The Western Carolina Paddlers' membership is comprised of paddlers of all types, including kayakers, canoeists, and rafters, all of whom are active in river conservation, access issues, and local paddle-sport events. The Western Carolina Paddlers has a combined membership of approximately 120 individual members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

26. Western Carolina Paddler's members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography,



fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

27. The Western Carolina Paddlers has standing in this case.

28. Plaintiff Foothills Paddling Club is a member-operated nonprofit corporation organized under the laws of South Carolina. Its principal place of business is 25 Heritage Green Place, Greenville, South Carolina 29601. The Foothills Paddling Club was founded in 1993 by a dedicated group of South Carolina's kayakers and canoeists to promote safe enjoyment of both whitewater and flatwater rivers. The Foothills Paddling Club has a combined membership of approximately 115 members, including members who reside near and/or have used and enjoyed the upper reaches of the Chattooga WSR prior to the river closure and are currently and unlawfully prohibited from doing so.

29. Foothills Paddling Club members have used, and but for the unlawful closure currently would be using, the section of river at issue in this case for primitive outdoor floating recreation involving scientific and nature study of various kinds, bird watching, photography, fishing, and a variety of other primitive floating recreation activities. These recreational, aesthetic, scientific and/or environmental interests have been, are being, and will be, adversely affected by Defendants' failure to comply with the statutes and regulations cited in this Complaint.

30. The Foothills Paddling Club has standing in this case.

31. Plaintiff Joseph C. Stubbs is an individual residing at 535 Earlvine Way, Kennesaw, Georgia 30152. Mr. Stubbs is an American Whitewater member who, prior to the

unlawful closure, paddled the upper reaches of the Chattooga WSR legally but is now prevented from doing so.

32. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the upper reaches of the Chattooga WSR were open for floating recreation in accordance with applicable law.

33. Mr. Stubbs has standing in this case.

34. Plaintiff Ken Strickland is an individual residing at 210 Padena Drive, Box #63 Morganton, Georgia 30560. Mr. Strickland is an American Whitewater member whose primitive recreational floating use of the upper reaches of the Chattooga WSR has been interrupted by defendants' unlawful closure of the river. Mr. Strickland has been paddling the Chattooga WSR for more than thirty years, including the Headwaters section prior to the illegal closure. Because of Defendants' unlawful river closure, it is currently a federal crime for Mr. Strickland to float his kayak on more than one-third of the wild and scenic and wilderness waters of the Chattooga WSR.

35. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the river were open for floating recreation in accordance with applicable law.

36. Mr. Strickland has standing in this case.

37. Plaintiff Bruce Hare is an individual residing at 30 Three Cabin Trail, Franklin, North Carolina, 28734. Mr. Hare is an American Whitewater member whose primitive recreational floating use of the Headwaters has been interrupted by Defendants' unlawful closure

of the river. Mr. Hare legally paddled the closed portions of the river prior to the unlawful closure and is now prevented from lawfully doing so.

38. He is personally harmed by the closure because he is unable to access one of his favorite waterways for river adventure and the myriad other primitive floating activities that he currently would enjoy if the river were open for floating recreation in accordance with applicable law.

39. Mr. Hare has standing in this case.

**B. Defendants**

40. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

41. Defendant Thomas Tidwell is the Chief of the U.S. Forest Service, and in that capacity he has the responsibility to ensure that his agency acts in accordance with applicable laws and regulations.

42. Defendant U.S. Forest Service is a federal agency within the U.S. Department of Agriculture. The U.S. Forest Service is, by law, responsible for the management policies and actions undertaken with respect to the Chattooga River and certain other rivers on public lands. By statutory authority, and the agency's own regulations, it is also responsible for implementing the APA, WSRA, the Wilderness Act, MUSYA, the RPA/NFMA, NEPA and other land management laws and regulations pertaining to actions and decisions on rivers flowing through lands the U.S. Forest Service administers.

43. Defendant Elizabeth Agpaoa is the Regional Forester for the Southern Region of the United States Forest Service. The Southern Region encompasses thirteen states, including those states that Chattooga River flows through - North Carolina, South Carolina and Georgia. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national

forests, all under the supervision of Defendant Agpaoa, selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

44. Defendant Monica J. Schwalbach is the acting Forest Supervisor for the Francis Marion and Sumter National Forests in South Carolina. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

45. Defendant Marisue Hilliard is the Forest Supervisor for the national forests in North Carolina, one of which is the Nantahala National Forest. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

46. Defendant George M. Bain is the Forest Supervisor for the Chattahoochee-Oconee National Forest, located in northern Georgia. In August 2009, the forest supervisors of the Sumter, Chattahoochee and Nantahala national forests selected Alternative 4 of the Upper Chattooga Environmental Assessment (EA) as the agency's final decision for the management of recreational uses on the upper Chattooga River.

47. Defendant Tom Vilsack is the Secretary of the U.S. Department of Agriculture, and in that capacity he has the responsibility of ensuring that the U.S. Department of Agriculture acts in accordance with applicable laws and regulations.

48. Defendant U.S. Department of Agriculture administers the National Forest system.

49. Defendants are hereinafter collectively referred to as “Defendants” or as the “U.S. Forest Service” unless context requires otherwise.

### **III. FACTS**

#### **A. Description of the Headwaters**

50. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

51. This case involves the Chattooga River, which was designated as a Federal Wild and Scenic River in 1974, pursuant to the WSRA.

52. The Chattooga WSR is a spectacular natural waterway originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northern Georgia.

53. The waters of the Chattooga WSR, which flow through the Nantahala, Chattahoochee, Francis Marion and Sumter National Forests contain navigable Class I through Class V rapids before eventually cascading into Georgia’s Tugaloo Reservoir.

54. Primitive floating has occurred on the Chattooga WSR for more than 250 years.

55. Only the remote twenty -one river miles of the Chattooga WSR upstream of South Carolina Highway 28 are at issue in this case. That twenty-one-mile section is referred to herein as the “upper Chattooga” or “Headwaters.”

56. Four roads subdivide the Headwaters into three reaches, known, from northern-most to southern-most as Grimshawes Bridge to Bull Pen Bridge (GS-BP), Bull Pen Bridge to Burrells Ford Bridge (BP-BF), and Burrells Ford Bridge to the Highway 28 Bridge (BF-28) (see Table I and the Headwaters map attached hereto as (COMPLAINT EX. 2)).

57. Many parts of the Headwaters corridor, particularly in the Ellicott Rock Wilderness, are accessible only by boat.

**B. History of the Ban on Floating**

58. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

59. In 1960, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA), a policy statement of land use management values.

60. With this list of potentially competing uses at its roots, section two of MUSYA further provides that the Secretary of Agriculture must administer the national forests for multiple use and sustained yield of the several products and services of the national forests. 16 U.S.C. § 529 (1988).

61. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

62. MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

63. The Wilderness Act was passed in 1964, and prohibited the use of commercial enterprises, in wilderness areas and except to the extent necessary for administration of the Act, motorized equipment, motorboats, landing of aircraft and all other forms of motorized transport were prohibited. 16 U.S.C. § 1311.

64. In 1968, Congress passed the WSRA. The purpose of the act was to create a national wild and scenic rivers system so that rivers with “outstandingly remarkable scenic, recreational ... or other similar values ...[would] be preserved in a free-flowing condition, and ... be protected for the benefit and enjoyment of future generations.” 16 U.S.C. § 1271.

65. The WSRA specifies that each federally designated wild and scenic river shall have a “comprehensive management plan” in place within three years of enactment and the plan should, among other aspects, address “user capacities.”

66. Section 1277 (b) of the Wild and Scenic Rivers Act provides for the use of condemnation when necessary to clear title or to acquire scenic easements or such other easements as are reasonably necessary *to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.* (emphasis added).

67. In 1971, local USFS personnel conducted a study of the Chattooga’s suitability for protection under the Wild and Scenic Rivers Act.

68. The Study recommended that Congress include all sections of the Chattooga River in the Wild and Scenic Rivers System, based in large part on the Chattooga’s outstanding recreation opportunities—and specifically whitewater boating on the upper Chattooga.

69. The Chattooga River was among the first rivers in the United States to be designated under the system, receiving its designation as a WSR in 1974.

70. To convince Congress that the Chattooga River was eligible for inclusion in the WSR system, the USFS published a *Wild and Scenic River Study Report* on June 15, 1971 (the “Study”).

71. Fittingly, the photo on the cover of the Study depicts a canoe floating the Chattooga.

72. The USFS recommended the following to Congress:

Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities. These activities like ...whitewater canoeing ... will enhance the recreation opportunities for many people in an area *where river-oriented recreation is scarce...*a river capable of

supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river...*Study*, 66-67.

73. The Chattooga River was considered for inclusion in the WSR system in six distinct sections.

74. Each of these sections was analyzed for inclusion separately, and each exhibited different outstandingly remarkable values and received different levels of protection based on those values.

75. The 1971 Study upon which Congress based its protection of the upper River recommends a “scenic” classification for the uppermost section of the Chattooga, noting:

Grimshawes Bridge crossing [which is 21 miles above Highway 28] is accessible by a country road. The section below the bridge can be floated by rubber raft and provides `exciting trips over small rapids and cascades. *Study*, 73.

76. The Study recommends a “wild” designation for several miles of river upstream of Highway 28 because, among other reasons:

Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen. *Study*, 74 (emphasis added).

77. The studies that the USFS sent to Congress, and upon which Congress based its protection of the upper Chattooga River, are laden with references to the value of these specific reaches as whitewater paddling resources. The table below documents these references, many of them to locations in the upper Chattooga:



| Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters |                     |  |   |
|---|---------------------|--|---|
| Paddling Section  | Designation Section | Source                                 | Quote or Reference  |
| General   | All                 | USFS 1971a*<br>Page 67                 | “Designating the Chattooga River a part of the National Wild and Scenic system would preserve—a river capable of supplying many intangible values. These values are difficult to assess but certainly exist for the canoeist as he meets the challenge of the river...”   |
| General   | All                 | USFS 1971a<br>Page 67                  | “Compatible uses on the Chattooga River are floating (including rafting, canoeing, and kayaking), hiking (including sightseeing, nature study, and photography), hunting, fishing, and primitive camping.”  |
| General   | All                 | USFS, 1971a Page 150                   | “Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.”   |
| General   | All                 | USFS 1970 Page 1.<br>USFS 1971b Page 5 | “The Chattooga is the only mountain river in the four state areas of North Carolina, South Carolina, Georgia, and Tennessee without substantial commercial, agricultural, or residential development along its shores.” “Visitors to this river are instantly transported into an unspoiled natural whitewater river wilderness.” “The beauty of the rapids of the Chattooga and the beauty of its scenery are unsurpassed” |
| General   | All                 | USFS 1971b**                           | “It is one of the few remaining rivers in the Southeast possessing free flowing whitewater in a primitive setting. For those eager to test this challenge, by floating it or walking beside it, it can provide a refreshing recreation experience.”   |
| Headwaters (GS-BP***)   | I                   | USFS 1970 Page 5                       | “Below Grimshawes Bridge, the river can be floated by raft.”  |

| Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters |                     |  |  |
|---|---------------------|--|--|
| Paddling Section  | Designation Section | Source                                 | Quote or Reference   |
| Headwaters (GS-BP)  | I                   | USFS 1971a Page 158                    | “Hikers, rafters and vehicles will frequently meet here because the road is the only major access to the river in the Headwaters area.” Text accompanies a drawing of Grimshawes Bridge notes the “beginning of rafting water” labeling the river immediately downstream of Grimshawes Bridge.   |
| Headwaters (GS-BP)<br>(BP-BF)<br>(BF-28)  | I, II, III          | USFS 1971a Page 163                    | Appendix I, Chattooga River Potential Recreation Development Plan Summary. Table indicates construction of canoe launch sites at two locations in the upper Chattooga.   |
| Headwaters (GS-BP)  | I                   | USFS 1970 Page 6<br>USFS 1971a Page 73 | “The section below the bridge (Grimshawes) can be floated by rubber raft and provides exciting trips over small rapids and cascades with frequent portages around difficult cascades and narrow sluices.”  |
| Headwaters (GS-BP)<br>(BF-28)   | I, II, III          | USFS 1971b                             | “In the management of the Chattooga River as a unit of the National Wild and Scenic River System, one objective will be to provide a recreation experience where a feeling of adventure, challenge, and physical achievement is dominant. In addition a maximum of outdoor skills, without comfort or convenience facilities will be provided. To provide this experience, river access will be primarily by trail, including canoe launch sites. Only three points will have road access—Grimshawes Bridge, Highway 28 bridge, and Highway 76 Bridge” |
| Headwaters (BP-BF)  | II                  | USFS 1971a Page 74                     | “This part of the river can be floated only in rubber rafts, and many dangerous portions must be portaged.” “Rafting or some method of floating is the best way to see this rugged portion of the river. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen.”   |
| Headwaters (BP-BF)  | II                  | USFS 1970 Page 9                       | “This entire section (Section II) is in a completely natural state. It includes some beautiful but hazardous whitewater. Enormous boulders, some   |

| Documentation Supporting the Designation of the Chattooga River as a Wild and Scenic River Based on the Values of Paddling the Headwaters   |                     |                    |  |
|---|---------------------|--------------------|--|
| Paddling Section  | Designation Section | Source             | Quote or Reference   |
| (BF-28)   |                     |                    | over 50 feet high with trees on top, rise from the riverbed. This part of the river may be floated only in rubber rafts and many dangerous portions must be portaged. In the entire 15.9 miles, only two narrow bridges cross the river.”  |
| Headwaters (BF-28)  | II                  | USFS 1970 Page 11  | The 8.0 mile section from Burrell’s Ford to the Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater. It flows around huge rocks and through narrow sluices and drops over 21 small waterfalls and rapids in less than two miles.” |
| Headwaters (BF-28)  | II                  | USFS 1971a Page 75 | “The eight mile section from Burrells Ford to Nicholson Fields is one of the most difficult portions of the river. This stretch includes exciting but treacherous whitewater.”   |
| Headwaters (BF-28)  | III                 | USFS 1971a Page 75 | Section III: also contains Headwaters section. “It is shallow and easy for the inexperienced canoeist.”  |
| Headwaters (BF-28)  | III                 | USFS 1970 Page 13  | “It (Section 3) is shallow and easy for the inexperienced canoeist.” (13)  |
| <p>* Note that 1971a refers to; USDA Forest Service. (1971a). Wild and Scenic River Study Report: Chattooga River, 1971b refers to: USDA Forest Service—Southern Region.<sup>13</sup> (1971b). Chattooga River as a Wild and Scenic River, and 1970 refers to: USDA Forest Service. (1970). A Proposal: The Chattooga, “A Wild and Scenic River.”<sup>14</sup></p> <p>** Note that 1971b does not contain page numbers.</p> <p>*** Note that “GS-BP” refers to the section of the Chattooga River between Grimshawes Bridge and Bullpen Bridge, “BP-BF” refers to the section of the Chattooga River between Bullpen Bridge and Burrells Ford, and “BF-28” refers to the section of the Chattooga River between Burrells Ford and Highway 28.</p> |                     |                    |  |

78. During its 1970 and 1971 studies to obtain congressional support to designate Chattooga as a WSR, the USFS specifically referenced channel characteristics supporting

<sup>13</sup> (COMPLAINT EX. 3)

<sup>14</sup> (COMPLAINT EX. 4)

navigability: “Designating the Chattooga River a part of the National Wild and Scenic River System would preserve a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities.

79. The USFS was also clear that Grimshawes Bridge was intended to be a major access area for paddlers to enter the Chattooga River: “Below Grimshawes Bridge, the river can be floated by raft.”

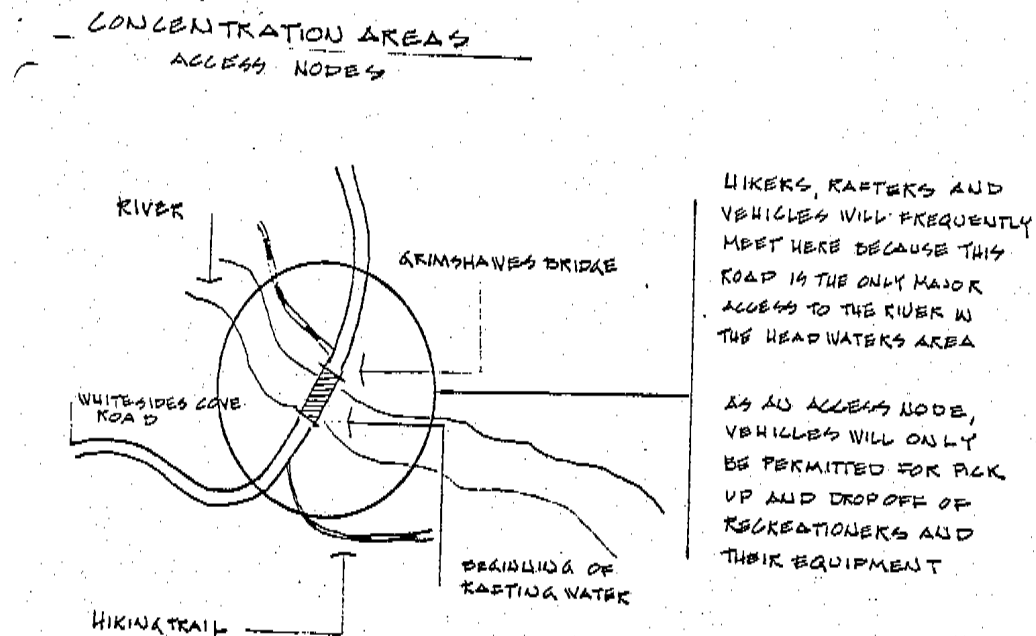
80. The Report stated: “Hikers, rafters and vehicles will frequently meet here (Grimshawes Bridge) because the road is the only major access to the river in the Headwaters area.”

81. The Study even includes a map labeling Grimshawes Bridge (the beginning of the upper Chattooga) as the “beginning of rafting water” and discusses several “canoe launch sites” on the Headwaters. *Chattooga River as a Wild and Scenic River*, at 158.

82. The USFS organized at least one rafting trip during preparation of the studies in support of Wild and Scenic designation, in the early 1970’s. It confirmed in the study report that “Grimshawes Bridge crossing is accessible by a country road.”

83. The USFS concludes in the study report that “the section below Grimshawes Bridge can be floated by rubber raft and provides exciting trips over small rapids and cascades ...” and that “Rafting or some method of floating is the best way to see this rugged portion of the river.”

84. The USFS WSR Report contains this sketch, showing Grimshawes Bridge as the “Beginning of Rafting Water”



85. Whitewater boating on the upper Chattooga was an existing and vital element of the recreation outstandingly remarkable value warranting inclusion of that section of the Chattooga in the WSR on the Headwaters system. In addition, whitewater boating is also a stand-alone value that to the Headwaters inclusion in the WSR system.

86. Rapids and the paddling experience are described in detail for each section of the upper Chattooga, and boating is described as “the best way” to see these sections.

87. Whitewater boating river values contributed to, if not controlled, how the Study’s drafters viewed and classified the upper Chattooga.

88. The Study makes clear that whitewater boating is a vital component of the river’s wild and scenic character and a use that should be protected by including the Chattooga in the WSR system.

89. Whitewater boating was one of the outstandingly remarkable values upon which the USFS based its recommendation for the Chattooga’s inclusion in the WSR system.

90. Based upon this study, Congress in 1974 included the Chattooga among the first rivers protected by the WSRA.

91. The entire upper Chattooga River was protected by Congress under the WSR system in 1974, in large part, because of the exceptional recreation value of boating on the upper river.

92. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

93. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

94. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process.

95. In 1975, certain portions of the Chattooga WSR corridor above Highway 28 were designated as “wilderness” under the Wilderness Act.

96. This area, known as the Ellicott Rock Wilderness, includes 8,271 acres of land in Georgia, North Carolina and South Carolina.

97. Five and two tenths miles of the Chattooga WSR traverses the Ellicott Rock Wilderness above Highway 28.

98. A hiking trail, known as the “Chattooga Trail” parallels this wilderness portion of river for approximately 3.2 miles.

99. While the Chattooga Trail remains near the river for most of this stretch, hikers following the trail remain visually separated from the river, save for occasional glimpses around or through natural obstructions.

100. The Ellicott Rock Wilderness and the section of the Chattooga WSR that flows through it are precious wilderness resources.

101. Two years after Congress included the Chattooga in the Wild and Scenic River System, local USFS personnel, at least one of whom was an officer in the local chapter of Trout Unlimited, banned floating on the upper Chattooga. Floating is one of the very forms of outstanding river recreation values that led to the river being included in the national WSR system.

102. The first official decision to ban boating above Highway 28 was made in connection with the 1976 Sumter National Forest Land and Resource Management Plan (LRMP). According to the LRMP, the ban on boating was justified by “public safety” concerns.

103. No user capacity analysis or other valid supporting documentation was included in the LRMP in connection with the ban.

104. The 1976 decision resulted in a handful of local anglers having a near monopoly on river recreation on the upper Chattooga.

105. The 1976 ban was made arbitrarily, outside of an open NEPA-type process, without public input, and in direct contradiction to the Study produced by the Sumter National Forest just five years earlier to support designation of the Chattooga as a WSR.

106. In 1985, a new Sumter National Forest LRMP was issued and the ban on floating continued.

107. In contrast to the 1976 ban where “public safety” was the stated justification, the 1985 floating ban stated that protection of “quality trout fishing” necessitated denying boaters access to the upper Chattooga.

108. This rationale was completely circular and without any rational basis. In essence, the “quality trout fishing” was the result of stocking non-indigenous fish to increase the fishing experience, and unlawfully banning floating to provide an artificial solitude experience.

109. As with the 1976 ban, the 1985 decision contained no user capacity analysis, valid supporting documentation or relevant research.

110. The boating community’s interest in the upper Chattooga was sparked by improved equipment that brought the upper Chattooga within the skill-level of more paddlers.

111. Although the boating on the Headwaters was banned in 1976, from 1976 through 1985, the USFS did not enforce the ban. Thus, between 1976 and 1985 a few members of the public occasionally floated the Headwaters as had been done for over 250 years.

112. When boaters learned of the prohibition, they began to challenged it.

113. As a result of challenges from boaters, in 2004, the USFS agreed to analyze why floating, a protected activity on the Chattooga Headwaters, had been illegally banned. This purported analysis was conducted in conjunction with the USFS Revised Land and Resource Management Plan (“RLRMP”) process.

114. Federal regulations require the USFS to periodically revise its management framework for managing the various national forests. The Regional level of the USFS conducts these revisions of its various forests on a rolling basis in cooperation with the local forests.

115. Historically, management of the entire Chattooga River, including the parts of the river corridor in Georgia and North Carolina, has been controlled by South Carolina’s Sumter and Francis Marion National Forests headquartered in Columbia, South Carolina.

116. Because “Region 8” of the USFS (also known as the Southern Region) had already slated 2004 as the timeframe for revising the Land and Resource Management Plan for



the Sumter and Francis Marion National Forests in South Carolina, the Regional Forester decided to use the RLRMP process to consider boaters' challenges to the Headwaters boating ban.

117. The 2004 RLRMP was divided into numerous "issues" that were being considered for revision. The USFS discussed the boating prohibition in "Issue #13" of "Appendix H" to the 2004 RLRMP.

118. Regrettably, the USFS ultimately failed to analyze the boating issue and instead published a cursory defense of its decision to maintain the boating ban.

119. The 2004 RLRMP discussion on boating contained no scientific analysis, contained only vague references to undocumented "potential" problems associated with "adding" boating as a "new" use.

120. Instead of reviewing why protected wild and scenic river activity had been banned and how it could be restored, the 2004 RLRMP discussion instead focused on imagined problems associated with introducing a "new" use to the river. The 2004 RLRMP discussed resource impacts related to all users in general and reasoned that "new" boating use would result in additional resource impacts (simply because there would be more users) and determined that such "potential" impacts were a basis for continuing the ban.

121. Plaintiff American Whitewater ("AW") timely appealed the 2004 RLRMP ban through the USFS's administrative process.

122. AW's administrative appeal challenged the boating prohibition on the grounds that it was arbitrary and capricious under the APA, that it violated the WSRA, the Wilderness Act, USFS regulations, and a host of other applicable laws and regulations and that it infringed on a federally protected right to use a federal resource.

123. The USFS did not respond to AW's appeal in a timely manner according to the USFS's own regulations.

124. After delaying a decision on AW's appeal for a year, the USFS Chief finally issued a decision on AW's appeal. In April 2005, the USFS Chief agreed with AW and reversed the boating ban:

After careful review of the record . . . I am reversing the Regional Forester's 2004 Decision to continue to exclude boating on the Chattooga [Headwaters]. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. *Id.* at Ex. 7, USFS, *Decision for Appeal of the Sumter Nat'l Forest Land and Res. Mgmt. Plan Revision*, 4 (April 28, 2005) [hereinafter, the "2005 Appeal Decision"].

125. However, in the same document in which the Chief reversed the 2004 Headwaters floating ban, he resorted, as a technical fallback, to the prior 1985 land and resource management plan for the Sumter National Forest.

126. The 1985 plan contained a boating ban, so the result was that the Chief reinstated a 1985 Headwaters floating ban in place of the invalidated 2004 ban—a ban that had been invalidated by the Chief on the grounds that it violated federal law.<sup>15</sup>

127. The apparent paradox in the Chief's order was mitigated by the fact that the Chief specifically identified for the Regional Forester the regulatory framework for immediately restoring paddling access: "36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed."

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<sup>15</sup> *Id.* at 5.

128. In conjunction with the reversal of the boating ban and the regulatory framework for restoring boating access, the Chief's order further directed the Regional Forester, *within two years* (i.e., by April 2007), to conduct a "visitor use capacity analysis, including non-commercial boat use" and to amend the 2004 RLRMP in accordance with the results of the capacity analysis.

129. Notwithstanding the Chief's 2005 Order, the USFS's regional office, and by extension the local forests under its control, continued to ignore Plaintiffs' federally-protected right to float the Headwaters.

130. First, the Regional Forester ignored the Chief's apparent intent that floating access be restored on the Headwaters during the "two year" amendment process in order to conduct a meaningful visitor capacity analysis that could determine an appropriate capacity number of users. The Chief pointed to "36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed."

131. Instead, the USFS maintained a complete ban on Headwaters floating, allowing less than 20 boaters access to the river *on only two days* during what ultimately became a 4.5 year amendment process. With boating banned, no user capacity analysis study "including whitewater boating" was ever conducted.

132. Second, the USFS's purported execution of the Chief's 2005 Appeal Decision was undertaken by local forest managers (called "Forest Supervisors") rather than by the Regional Forester. This deviation from the Chief's order is significant because of the local forest managers' distaste for boaters after having their 2004 ban reversed, their coziness with a small, but influential anti-boating interest, their demonstrated propensity to ignore federal law and USFS policy, and their apparent desire to prohibit Headwaters floating at any cost. Despite

repeated protests by Plaintiffs, local forest managers remained in control of the amendment process throughout its duration.

133. Although AW prevailed in appealing the 2004 ban, Plaintiffs none the less remained banned from floating the Headwaters. Thus, Plaintiffs assisted by Atlanta, GA based *pro bono* counsel sought relief in the United States District Court for the Northern District of Georgia.<sup>16</sup> The Plaintiffs asked the Northern District of Georgia for an order requiring the USFS to restore floating access while the USFS conducted a user capacity analysis.

134. The USFS opposed the Plaintiffs' request and argued that the floating ban was not yet ripe for judicial review because the USFS was still in the process of amending the 2004 RLRPM and might ultimately restore floating access, thus rendering moot the Plaintiffs' arguments and requested relief. The Northern District dismissed Plaintiffs' case, holding that Plaintiffs' claim was not yet ripe for judicial review. However, the Court repeatedly noted that the case would be ripe once the USFS issued its 2009 Amendment.<sup>17</sup>

135. The court expressly and repeatedly stated that the soon to be issued Amendment would represent Defendants' final administrative action and would be ripe for judicial review, assuring that: "[w]hether that amended plan renews or lifts the floating ban, *the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time;*"<sup>18</sup> that "*if plaintiffs find the amended 2004 plan unacceptable, they can challenge that plan, and if judicial review is needed, it will be available . .*

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<sup>16</sup> See Pl.'s Compl., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 1]; see also Pl.'s Mot. for Prelim. Inj., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 3].

<sup>17</sup> See *American Whitewater v. Bosworth*, No. 2:06-CV-74-WCO, \*12-13, 18, 20 (N.D. Ga. Oct. 6, 2006) [Doc. 23].

<sup>18</sup> *American Whitewater*, No. 2:06-CV-74-WCO at \*12-13 [Doc. 23].

. ;”<sup>19</sup> and that “[i]f [Plaintiffs’] vision [“of an open Headwaters”] does not materialize, *they can be assured that the courts will be open and willing to review their complaints at that time.*”<sup>20</sup>

136. The USFS missed its two-year deadline to amend the boating ban imposed by the 2004 RLRMP. In fact, it ultimately took Defendants four and a half *years* to publish an amendment that deviates little from the original decision reversed by the Chief.

137. Throughout the four and a half year decision period, Plaintiffs participated in every phase of the administrative process by attending USFS meetings and hearing, submitting comments to every draft of the USFS amendment document, corresponding with the USFA on numerous occasions to remind the agency of its obligation to restore hand-powered boating on the Headwaters and to execute a user capacity analysis that actually determines a numerical capacity of the river for users. The USFS failed to properly respond to or address Plaintiffs’ comments. *See* Colburn Declaration, October 9, 2009 filed with Motion for Temporary Restraining Order. The Colburn Declaration is incorporated herein.

138. More than 1000 boaters from across the country asked the USFS to lift the boating ban in its 2004 RLRMP. Even more boaters requested the same of the USFS during the protracted amendment process. The USFS failed to properly respond to or address these requests.

139. Finally, on August 25, 2009, in direct violation of the USFS Chief’s order, three Forest Supervisors, *not the Regional Forester*, issued the long-awaited 2009 Amendment to the 2004 RLRM. The 2009 Amendment deviates little from the invalidated 2004 RLRMP.

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<sup>19</sup> *Id.* at \*18.

<sup>20</sup> *Id.* at \*20.

140. Like the 2004 RLRMP, the 2009 Amendment is based on an incomplete study that in no way meets the legal requirements for a user capacity study.<sup>21</sup> It is a user capacity study in name only.

141. The 2009 Amendment purports to provide “all potential users with a fair and equitable chance to obtain access to the river,”<sup>22</sup> but boaters are singled out for harsh restrictions while *all other users have unlimited access to the resource all year long*. In other words, the 2009 Amendment *only* restricts boating.

142. The 2009 Amendment bans boating on all but one seven-mile stretch of the nearly twenty-two miles of Headwaters. Those seven miles are separated from the rest of the river by complete floating bans on the Headwaters sections immediately upstream and downstream.

143. The 2009 Amendment permits boating on this small section of the Headwaters only in the dead of Winter—only during the months of December, January, February—and only when the Headwaters have exceptionally high water levels.<sup>23</sup>

144. Boaters must hike 1.5 miles with their canoes or kayaks to the beginning of the section to access that section of the Headwaters.

145. Although Congress noted that there were readily accessible roadside launch sites when it designated the Chattooga as a Wild and Scenic River, the USFS has barred boaters from using those sites.

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<sup>21</sup> See Ex. F, Declaration of Glenn E. Haas 1-2. See Haas Declaration filed with Motion for Temporary Restraining Order. The Haas Declaration is incorporated here in.

<sup>22</sup> Ex. B, Colburn Decl., Ex. \_\_, USFS, *Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan: Managing Recreation Uses on the Upper Chattooga River*, 4 (Aug. 25, 2009) [hereinafter, the “2009 Amendment”]. See Colburn Declaration filed with Motion for Temporary Restraining Order. The Colburn Declaration is incorporated here in.

<sup>23</sup> 2009 Amendment 2.

146. The 2009 Amendment also bars boaters from floating the entire 52-mile length of the Chattooga River from Grimshawes Bridge to Tugaloo Reservoir.

147. In stark contrast to its treatment of boaters, the 2009 Amendment grants wholly unrestricted access to and use by *all other* user groups.

148. By the USFS's own Orwellian estimation, this "fair and equitable access" would permit boaters to access one section of the Headwaters between zero and eleven days per year (and only in the Winter), with a likelihood of 3 days per year. In comparison, *all other user groups* are permitted to access and use the entire length of the Headwaters 365 days a year.

149. The 2009 Amendment, which maintains the illegal ban on paddling on the Headwaters, violates the same federal laws cited by AW in its 2004 Appeal of the 2004 RLRMP and the same federal laws that Chief of the USFS cited when he reversed the 2004 RLRMP.

#### **IV. COUNTS**

##### **A. Violation of the Wild and Scenic Rivers Act**

150. Plaintiffs incorporate the allegations otherwise set forth in this Complaint as if fully set forth herein.

151. The 2004 USFS Land and Resource Management Plans for managing recreation uses on the Upper Chattooga River violated the Federal Wild and Scenic Rivers Act by instituting a total ban on all boating on the upper Chattooga.

152. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Federal Wild and Scenic Rivers Act by implementing a ban on boating on two of three sections of the upper Chattooga.

153. The 2009 USFS Amended Revised Land and Resource Management Plans violated the Wild and Scenic Rivers Act by refusing to manage the  $\pm$  two miles of Wild and Scenic River downstream of Grimshawes Bridge flanked by private property.

154. There were no user capacity analyses conducted prior to implementing the 1976, 1985, and 2004 USFS Land and Resource Management Plans, yet floating was banned. This is a violation of the WSRA.

155. There was no legally valid user capacity analysis conducted prior to issuing the 2009 Amendment to the 2004 plan, yet floating was banned on two of three sections of the upper Chattooga, and virtually banned on the middle section. This is a violation of the WSRA.

156. Section 1281 of the WSRA provides in relevant part:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. 16 U.S.C. § 1281(a).

157. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the Wild and Scenic Rivers Act.101.

158. Whitewater boating is one of the values that prompted Congress to designated the upper Chattooga River as a WSR. It therefore must be protected and enhanced, not banned. The ban violates the WSRA.

159. Boating does not substantially interfere with public use and enjoyment of river values, and therefore its use should not be limited. In doing so, the USFAS violated the WSRA.

160. Floating must be protected and enhanced because in addition to itself being a stand alone value, it is also a fundamental component, one of the outstandingly remarkable values that caused the Chattooga to be included in the WSR system. The USFS failure to protect and enhance whitewater boating violates the WSRA.



161. Banning floating on over one-third of the Chattooga WSR—particularly on the cherished wilderness portions—destroys, rather than protects and enhances, this important value in violation of the WSRA.

**B. Violation of the Wilderness Act**

162. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

163. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days in the Winder on the middle section), violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is required to protect and enhance.

164. The 1976, 1985, and 2004 USFS Land and Resource Management Plans and the 2009 Amendment to the 2004 Plan, by banning floating on the upper Chattooga (with the *de minimis* possible exception of a few days on the middle section), results in an allocation of uses in the Ellicott Rock Wilderness that violates the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

165. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions ....” 16 U.S.C. § 1131(a).

166. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness ....” *Id* (emphasis added).

167. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

168. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

169. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

170. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

171. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

172. Thus as primitive recreation opportunities, hand-powered kayaking and canoeing are wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

173. Defendant’s own regulations implementing and giving effect to the statutory requirements of the Wilderness Act define hand-powered canoeing and kayaking as wilderness-complaint uses. *See* USFS Manual 2320.5.3.

174. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

175. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

176. Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added).

177. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

178. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

179. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

180. Banning floating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

181. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

### **C. Violation of the Multiple Use**

182. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

183. Section 1 of MUSYA provides that “the national forests are established and shall be administered for *outdoor recreation*, range, timber, watershed, wildlife and fish purposes.” 16 U.S.C. § 528 (1988) (emphasis added).

184. The MUSYA further mandates “due consideration” of the “relative values” must be given when balancing uses.

185. Many potential uses of the National Forest lands lack a market value in terms of dollars.

186. Readily available market values do not exist for aesthetics, recreation, watershed, and wildlife.

187. While no market value is readily available, the statute mandates that the value of these resources be considered.

188. Balancing values must also be consistent with other laws.

189. The Forest Service failed to attribute the appropriate “value” to boating the upper Chattooga and therefore could not possibly have properly balanced the mix of uses adequately.

190. Congress included the upper Chattooga River in the Wild and Scenic River system, in part, because whitewater boating is an “outstandingly remarkable” value of that river.

191. Because Congress fixed the value of river recreation on the Chattooga WSR as “outstanding” and “remarkable,” the USFS should have accorded river recreation that same value, and should have given substantial value to the importance of preserving boating recreation.

192. Accordingly, the USFS has failed to comply with the MUSYA’s requirement to give “due consideration” to the “relative values of various resources in particular areas.”

193. Whitewater boating on the upper Chattooga is an “outstanding” and “remarkable” value. As such, that value must be protected and enhanced in any appropriate balance of multiple uses.

194. Defendants have not attributed any value to floating on the Headwaters, by setting the amount of floating at zero while not limiting other uses. Therefore, Defendants have not given due consideration to the relative values in violation of the MUSYA.

195. Defendants have not attributed any value to floating on the Headwaters, even though Congress included the Headwaters in their identification of floating as an outstandingly remarkable value. This is a violation of the MUSYA.

**D. Violation of the National Forest Management Act**

196. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

197. In 1974, Congress passed the Forest and Rangeland Renewable Resources Planning Act (RPA), which mandates federal planning for national forest lands. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified at 16 U.S.C. §§ 1600-1614 (1988)).

198. Congress amended the RPA by enacting the National Forest Management Act of 1976 (the “NFMA”).

199. In enacting the RPA/NFMA, Congress incorporated the policies of multiple use and sustained yield into the forest planning process. NFMA creates a statutory framework for the management of National Forests.

200. NFMA states that the Forest Service “shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a).

201. NFMA provides a two-step process for forest planning. First, the Forest Service must develop a Land Resource Management Plan (“LRMP”) and an EIS for the entire forest. *See* 36 C.F.R. § 219.10(a), (b). Second, once the LRMP is in place, the Forest Service must assess site-specific projects in light of the LRMP. *See* 36 C.F.R. § 219.10(e).

202. The LRMP is in essence, a programmatic statement of intent that establishes basic guidelines and sets forth the planning elements that will be employed by the Forest Service in future site-specific decisions.”

203. Among other items, an LRMP must provide for multiple use and sustained yield of the products and services obtained from that use, including outdoor recreation. *See* 16 U.S.C. § 1604(e).

204. The USFS did not adequately provide for multiple use of resources—specifically with respect to outdoor recreation. The USFS’s programming statement of intent that establishes planning guidelines basically bans all boating on the Headwaters, which constitutes more than 40% of the Chattooga River.

205. “Due consideration” was not given to “relative values” in the LRMP and EIS as required by the RPA/NFMA.

206. Defendants’ failure to consider the outstandingly remarkable value of river recreation violates MUSYA. Therefore it also violates RPA and NFMA, which require the USFS to comply with MUSYA when managing the National Forests.

**E. Violation of the Fifth Amendment of the United States Constitution**

207. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

208. The floating ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

209. Congress protected the Upper Chattooga as a WSR for the express purpose of protecting and enhancing outstandingly remarkable river values such as floating, yet the USFS banned floating and did so without any rational basis.

210. The USFS deprived Plaintiffs of the liberty to do as Congress intended, violating the Plaintiffs’ rights under the Fifth Amendment of the United States Constitution.

211. The ban of paddling on the river irrationally deprives recreational boaters of their liberty of movement on a river that the Wild and Scenic River Act says is to be managed and maintained expressly for their benefit.

212. The ban violates the equal protection clause of the Fifth Amendment by unconstitutionally singling out primitive boaters for adverse treatment without a rational basis.

213. The upper Chattooga is a section of public river that is required by Congress to be protected and enhanced for the benefit of all Americans who wish to engage in primitive recreational activities, yet members of the public who would engage in floating are the only class to be singled out and denied access to this section of public river.

214. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationalists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

215. The following statements from the USFS EA and ROD demonstrate the failure of the USFS to provide equal protection to all users:

- There is a need to protect the unique angling experience above Highway 28.
- Allowing whitewater boating on some or the entire upper Chattooga River has the potential to ... affect the high-quality backcountry angling experience.
- Public comments and Forest Service studies have shown that angler/boater encounters are among the most important impacts associated with allowing boating on the upper Chattooga.
- [The USFS selected Alternative 4] emphasizes year-round, high-quality trout fishing.

- The take-out [mandated by the USFS selected Alternative 4] at Burrells Ford avoids potential on-river encounters with anglers in the Rock Gorge and in the delayed-harvest area.
- By establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

216. Nowhere in the EA does the USFS acknowledge that “there is a need to protect the unique *boating* experience above highway 28.”

217. Nowhere in the EA does the USFS acknowledge the ban on paddling not only “has the potential to ... affect the high-quality backcountry *boating* experience” but totally eviscerates this experience from the river.

218. Nowhere in the EA is there a proposed an alternative banning angling to “avoid potential on-river encounters with boaters.”

219. Nowhere in the EA does the USFS consider or find that “By establishing flow, season, and reach restrictions on *angling*, the high-quality boating experience is maintained and potential conflicts are reduced.”

220. This was a one sided analysis, conducted with a predetermined outcome.

221. Whitewater boaters are denied equal protection under the laws because they are discriminatorily singled out and totally banned from access with no rational basis while all other primitive recreationists are allowed to use the upper Chattooga without significant restriction or limitation.

## **F. Violations of the Administrative Procedures Act**

### **1. Failure of USFS to Follow its Own Regulations**

222. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.



223. Under the Administrative Procedure Act (the “APA”), an agency’s decision may be set aside by a reviewing court if the court finds the decision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

224. When an Agency fails to follow its own regulations and procedures, its actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. The examples below all demonstrate that the USFS has violated the Administrative Procedures Act.

225. In banning floating, the USFS contravened its own regulations regarding how a Wilderness area should be managed.

226. The de facto boating ban flies in the face of these important regulatory directives. Floating is banned, not optimized.

227. The ban stands in direct opposition to the requirements that the Forest Service promote and perpetuate recreational use, and that wilderness is to be made available to the “optimum extent” consistent with wilderness preservation.

228. Banning a 250+ year historical and traditional form of wilderness recreation does not promote or perpetuate that recreation.

229. Human use is certainly not permitted to its optimum extent where, as here, a low-impact form of primitive recreation is virtually banned.

## **2. The Floating Ban Violates The Forest Service Manual**

230. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

231. Banning a use is the most extreme action that the USFS has at its disposal for limiting use of a resource. The USFS Manual recommends that managers of Wild and Scenic Rivers “apply indirect techniques for regulation of use before taking more direct action.”

232. “Indirect techniques” means techniques (such as signage) that minimize or eliminate management concerns while still allowing users to access the resource. The USFS has never applied indirect techniques in the Headwaters.

233. The Forest Service Manual contains the following Wilderness Act policy:

Maximize visitor freedom within the wilderness. Minimize direct controls and restrictions. Apply controls *only when they are essential for protection of the wilderness resource* and *after indirect measures have failed*.

234. The USFS virtual ban on boating in the Headwaters is in violation of the above policy because indirect measures were never tried, and because boating poses no threat to the wilderness resource.

235. The USFS Manual suggests the following approach: “When it becomes necessary to limit use [of a WSR], ensure that all potential users have a fair and equitable chance to obtain access to the river.”

236. If the USFS is to limit use of the Chattooga Wild and Scenic River corridor, it should allow all compatible recreational uses, and then limit access to the river equitably among those uses. Banning floating, while allowing all other uses to occur without any limits, is discriminatory and does not meet the stated objective of limiting use.

237. By banning floating on the Headwaters of the Chattooga, while allowing all other uses to occur without limits, the USFS is not providing paddlers a fair and equitable chance to obtain access to the river.

238. If use is to be limited, *all* users should be limited, not just one. By banning only one use, the USFS is being arbitrary and capricious, abusing its discretion and otherwise not in compliance with the law.

239. The intense and unprecedented management controls that apply only to boaters and on such a limited scope and time do not comply with USFS policy of minimizing direct controls and restrictions.

240. No other USFS management of any day use, or overnight use for that matter, anywhere in the country is burdened with such harsh and burdensome restrictions.

241. No other Headwaters user group is subject to the restrictions and burdens placed on floating.

242. With respect to the middle section of the Headwaters, which runs through a protected Wilderness, the USFS Manual provides that one of the objectives for management of wilderness is to: "Protect and perpetuate wilderness character and public values including, but not limited to...primitive recreation experiences." USFS Manual § 2320.2.

243. That provision is later clarified in section 2320.5.3, indicating that rafts and canoes are considered primitive devices suitable for use in wilderness.

244. Banning floating on this reach on an average of 362 days each year is in violation of USFS policy.

245. Section 2323.14 of the USFS Manual instructs that managers of wilderness areas should "provide for the limiting and distribution of visitor use according to periodic estimates of capacity in the forest plan."

246. The USFS offers no estimates of user capacity for anglers, boaters, or other dispersed recreationists in the Ellicott Rock Wilderness Area, yet takes the most extreme use limitation measure available: virtually banning a use.

247. Without the information provided in a valid user capacity analysis, the USFS has violated the directives for managing wilderness areas.

**3. The USFS Failed to Follow The Directives of the Chief to Comply With American Whitewater's Successful Appeal of the 2004 Revised Plan.**

248. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

249. When American Whitewater successfully appealed the 2004 Revised Plan, the Chief of the USFS issued a decision that required the Regional Forester to conduct a user capacity study and to engage in a number of other activities.

250. The Regional Forester and Forest Supervisors failed to comply with the Chief's decision. That failure renders the 2009 Amendment arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

251. The Appeal Decision required that several considerations be made in the EA and in future management – the majority of which were not complied with in the 2009 Amendment and EA.

252. The Decision ordered that the USFS address the “Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge.” (ROD pg. 3)

253. The USFS failed to analyze the entire length of river required by the Decision. The USFS does not analyze the over 2 mile section of river at and immediately downstream of Grimshawes Bridge.

254. The USFS, with very little analysis, makes new, extreme, management decisions related to Chattooga River tributaries, claiming that such tributaries are outside the scope of the ROD.

255. The Decision ordered that the USFS must ensure that “If it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river.”

256. The 2009 Amendment does not ensure that all potential users have a fair and equitable chance to obtain access to the river. On the contrary, the USFS does not treat all users equitably.

257. The USFS published a list of alternative new management regimes before ultimately adopting its “preferred alternative” which became the 2009 Amendment. Each proposed alternative singled out floating for unique and harsh limits.

258. The Decision ordered that the EA must ensure that Wilderness “be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness.”

259. The 2009 Amendment does not meet this mandate. Encounter standards as well as the causes of existing biophysical impacts are left unmitigated in the proposed alternative.

260. The Decision ordered that the USFS must ensure that “wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions” (36 CFR 293.2(b)).

261. The 2009 Amendment does not optimize floating. It bans floating and allows all other WSR uses in unlimited amounts at all times.

262. The Decision orders that the USFS ensure that ““direct controls and restrictions” be minimized, and that controls are to be applied only as necessary to protect the wilderness resource after indirect measures have failed (FSM 2323.12) (COMPLAINT EX. 5).”

263. The 2009 Amendment immediately applies direct control and restrictions by implementing unjustified direct boating limits prior to trying indirect measures.

264. The Decision orders that the USFS ensure that “limitation and distribution of visitor use should be based on “periodic estimates of capacity in the forest plan” (FSM 2323.14).” Specifically, the Order states: “I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, *including non-commercial boat use*.” (Emphasis added).

265. The EA for the 2009 Amendment does not contain a user capacity analysis that meets the standards for such an analysis. At most it addresses past and current use, with no consideration of capacity. In addition, the EA is limited in scope to addressing the capacity of paddlers – not all WSR users as directed by the Decision.

266. The Decision found that the RLRMP was “deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.”

267. The 2009 Amendment contains this same deficiency. It is simply a rewritten version of the same inadequate discussion document and ultimately proposes virtually the same actions.

268. The USFS wholly fails to meet the legally required goals for the EA and the ultimate decision as directed by the Chief in the Decision.

**4. The USFS Abdicated its Lawful Duty to Protect and Enhance Outstanding Recreational Values on the Northern Most Section of the Headwaters**

269. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

270. The section of the Chattooga River designated as Wild and Scenic begins at its northernmost point, Grimshawes Bridge on USFS lands.

271. Shortly downstream, the Wild and Scenic River flows through private lands for approximately 1.7 miles before reentering USFS lands for the remainder of its journey to Lake Tugaloo.

272. In all alternatives, the USFS would unlawfully ban floating on this section of the Headwaters.

273. The USFS failed to analyze, protect, manage, or enhance even a single Outstanding Remarkable Value (ORV) on the reach of the river flowing through private lands, in direct violation of the WSRA.

274. One ORV that could easily be protected in this reach is recreation, and floating is the one form of recreation requiring little or no stream bank access, and yet the USFS banned this use without analysis in their EA and 2009 Amendment.

275. The consideration of paddling the upper half of the Chattooga Cliffs reach is simply discounted by the USFS as “out of scope” in the EA’s “Other Concerns” section.

276. The USFS state: “This issue is outside the scope of this proposal. The Forest Service does not encourage trespass on private lands.”

277. Aside from the upper Chattooga, the USFS does not ban uses (like paddling, hiking, hunting, etc) because recreationists may stray onto private lands.

278. Virtually all public lands are contiguous with private lands. Thus, without considering its legal obligations, the USFS simply chose not to consider recreational activities on this stretch of the Headwaters for which Congress had found floating to be an outstanding value.

279. While the EA is silent on why the reach was considered out of scope, a memo from the Southern Region Planning Staff, titled "Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River," dated September 25, 2007 (COMPLAINT EX. 6), explicitly advised that this section of river be eliminated from analysis:

Although two identifiable stretches of private lands are located in North Carolina along the Chattooga River, the uppermost potential location to put in for recreational boating and general recreational access occurs at Grimshawes Bridge (County Road 1107) in North Carolina. The land on the north side of the bridge is part of the National Forest System, while the south side of the bridge marks the beginning of the Rust property.

Boaters putting in at this location and wishing to continue down the river would have to pass through the Rust property, which would put them at risk of potentially committing trespass. The private land interests in this segment of the river have expressed their opposition to public boating and general public use through the Rust property at any time and under any conditions. It is likely that any member of the general public attempting to use this section of the river would face legal action brought by the landowners.

280. In a letter dated September 26, 2007, then Forest Supervisor Jerome Thomas advised John Cleeves, the Chattooga River Analysis Core Team Leader and Interdisciplinary Team Leader:

In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river.

281. This direction is directly contrary to law.



282. The USFS owns a canoe launch site immediately upstream of Grimshawes Bridge with road access. The site – which was labeled “the beginning of rafting waters” in the USFS 1971 study, allows boaters to access the Headwaters without entering upon any private land.

283. Boaters may proceed downstream from this point for 52 continuous river miles of world class whitewater without even setting foot on any private property. Before the illegal ban, this was the regular custom of hand-powered canoeists and kayakers like the individual plaintiffs.

284. The USFS has well established authority to regulate – and allow – paddling through private lands on Wild and Scenic rivers based on the Property Clause of the Constitution. In *U.S. v Lindsey*, the court ruled: “It is well established that this [Property] clause grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters.” 595 F.2d 5 (1979). “Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.” *Id.*

285. This authority overrides any conflicting state laws, based on the *Supremacy Clause* of the Federal Constitution.

286. This authority is clearly stated in the Forest Service Manual chapter addressing river recreation management:

Administration of the rivers within the National Forest System falls under the general statutory and regulatory authorities, including mining and mineral leasing, laws, that apply to lands. The basic authority to regulate public use of waters within the boundaries of a National Forest *or Wild and Scenic River* derives from the property clause of the U.S. Constitution as implemented through the laws pertaining to the administration of the National Forests. The authority of the Secretary of Agriculture to regulate the public use of waters found at 16 USC 551 has been upheld in many court decisions. The most notable cases are: *United States*

*v. Lindsey*, 595 F.2d 5 (1979). The court held that within a federally designated area the Federal Government had the authority to regulate camping on State-owned land below the high water mark of a river. *United States v. Richard*, 636 F.2d 236 (1980) and *United States v. Hells Canyon Guide Service*, 660 F.2d 735 (1981). The courts held that the Forest Service can regulate use of a river notwithstanding the fact that users put in and take out on private land.

287. The Forest Service Manual is clear: the Forest Service retains authority to regulate the use of a river and the National Forest lands on the shorelines whether it is navigable or nonnavigable. Failure to do so is arbitrary and capricious, an abuse of authority and otherwise contrary to law.

288. A 2003 GAO Report (COMPLAINT EX. 7) reached a similar conclusion:

*The Property Clause* permits federal regulation of water as necessary for the beneficial use of federal property.

289. The USFS must protect the ORVs of the Upper Chattooga River as it flows through private lands, yet elected not to even consider this section in their EA, despite being directed to do so by the USFS Chief and required to do so by applicable law.

290. The USFS abdicated its responsibility to protect and enhance the Chattooga River and support its recreational enjoyment, thus violating the Wild and Scenic Rivers Act.

291. The USFS violated the directives of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses in the Chattooga river corridor of the Ellicott Rock Wilderness.

292. Not only does the USFS's omission of the uppermost two miles violate the Administrative Procedure Act, it also violates the WSRA, and NEPA. The entire upper stretch of the Chattooga was historically open to boating – even when the entire reach was private property.

293. All alternatives addressed in the EA propose a ban on the upper half of the Wild and Scenic Chattooga Cliffs reach without any rationale, analysis, or justification. There is no discussion of the basis for the agency's failure to consider alternatives other than banning paddling, except a single sentence claiming the reach is "outside the scope of this proposal."

294. Banning floating on this reach is without a legal or rational basis and is a significant federal action limiting the public's legal rights.

295. The USFS has not conducted a user capacity analysis or collected any recreational information on this portion of the Headwaters on which to base a decision.

296. The public has been banned from floating this reach even during the USFS one-time on-river assessment in 2007. The USFS conceded this point in a memo from the Southern Region Planning Staff, titled "Recommendations Regarding the Range of Alternatives For Management of the Upper Chattooga River," dated September 25, 2007:

Additionally, information regarding the ability to float and recreate on this stretch of the river and the environmental impacts of such uses *is incomplete and inconclusive*. To date, the Forest Service has been unable to secure the access needed from private land interests in this segment to assess conditions in the area. Therefore, the agency is limited in its ability to conduct an environmental assessment of alternatives which would permit boating and other recreational uses of the general public along this stretch of the river.

297. The USFS claims it could not study a federally protected river because adjoining private property landowners would not grant the USFS access. Yet, no permissions or access is required.

298. Boaters can enter the river on USFS land immediately upstream of Grimshawes Bridge and float the entire stretch through private property without setting foot on any private land. The arbitrary exclusion of this area from analysis violates NEPA and the APA.

299. In addition, because the agency failed to analyze floating use through the reach, the USFS believes it must therefore ban paddling – thus exacerbating its previous arbitrary and capricious decision.

300. The river should be open to paddling until conditions prove limits are needed. Indeed, the last time the USFS studied this section of river (in the 1971 study) they determined that floating this section was entirely appropriate. There has never been a contrary finding.

301. Furthermore, every whitewater river and stream in the entire region is open to kayaking and canoeing without any limits thereon. The USFS assumption that in this case the default management of the river should include a complete paddling prohibition is wholly inconsistent with normal management.

302. The Upper Chattooga River should be open to paddling unless there is a compelling reason to limit it. In this case, the USFS has failed to produce any such rationale. Because no rational basis is provided, this decision is arbitrary and capricious.

303. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

304. The USFS has never banned paddling on a river, Wild and Scenic or otherwise, based on concerns about trespass on adjacent private lands. Indeed virtually all USFS managed rivers at some point flow through or onto private lands.

## **5. Boating Will Not “Substantially Interfere” with River Values**

305. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

306. The WSRA provides that authorized uses should not be limited unless they ‘substantially interfere’ with the river’s remarkable values.

307. Whitewater boating on the upper Chattooga is one of that section's outstandingly remarkable values. It is also an inseparable element of the recreation ORV.

308. All proposed uses of the upper Chattooga should be scrutinized under section 1281 to determine whether they 'substantially interfere' with, among other things, whitewater boating, not the other way around.

309. Because whitewater boating is an ORV, it cannot substantially interfere with itself, and therefore it cannot be limited (unless some form of limitation would actually protect and enhance the whitewater boating value), unless all other ORVs are limited equitably.

310. Whitewater boating does not 'substantially interfere' with any other outstandingly remarkable value.

311. While the USFS makes vague references to the *possibility* of some conflict between boaters and anglers or hikers, the record demonstrates that there will be *no* conflict between such uses, much less 'substantial interference.'

312. Another important reason that the record fails to demonstrate 'substantial interference' is that the USFS's reasoning is premised upon a false assumption: that whitewater boaters would be a "new" user group.

313. The USFS vague projections of conflict erroneously pit a "new" user group against "existing" user groups.

314. The reason the USFS attempts to designate whitewater boaters as a "new" user group is because the two prior (1976 and 1985) LRMPs also banned whitewater boating in violation of section 1281.

315. If any decision alters the *status quo ante*, it is the decision to ban a historical use that is cited in the Study as an important river value.

316. Boating is not “new” to the Chattooga.

317. Boating has been an important form of recreation on the entire reach of the Chattooga River for more than 250 years.

318. Accordingly, the USFS’s “new” versus “existing” analysis of conflict is based upon a false assumption and cannot substantiate vague claims of user conflicts.

319. Even if everything in the EA is accepted as true, there is no evidence that whitewater boating “*in fact substantially interferes*” with other values.

320. Unless there is clear evidence that floating ‘substantially interferes’ with outstanding river values, the USFS cannot even *limit* boating—much less ban it.

**6. The USFS has not performed a User Capacity Analysis for the W&S upper Chattooga River**

321. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

322. The Wild and Scenic River Act, as recognized in the Decision on American Whitewater’s appeal of the 2004 Revised Land and Resource Management Plan required the Sumter National Forest to conduct a user capacity analysis.

323. User capacity analyses are mandatory as a basis for managing both the types and levels of use.

324. The EA and 2009 Amendment do not state a total recreational capacity for the Upper Chattooga River, or capacities for individual types of use. Therefore, it is not a user capacity analysis. *See* Haas Declaration as filed with Motion for Temporary Restraining Order. The Haas Declaration is incorporated here in.

325. The Integrated Report (Shelby and Whittaker 2007) is not a user capacity analysis and identifies no capacities for the river corridor.

326. Without a user capacity analysis showing that boating must be limited to protect the resource, the USFS has no basis to limit boating.

327. The National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas (the “Secretarial Guidelines”) addressed user carrying capacity. 47 Fed. Reg. 39,454 (Sept. 7, 1982).

328. The Secretarial Guidelines define “carrying capacity,” as “[t]he quantity of recreation use which an area can sustain without adverse impact on the [ORVs] and free flowing character of the river area, the quality of recreation experience, and public health and safety.” *Id.* at 39,455.

329. The Secretarial Guidelines state that:

“[s]tudies will be made during preparation of the management plan and periodically thereafter to determine the *quantity and mixture* of recreation and other public use *which can be permitted* without adverse impact on the resource values of the river area. Management of the river area can then be planned accordingly.” *Id.* at 39,459 (emphasis added).

330. *Friends of Yosemite v. Kempthorne*, 520 F.3d 1024, recently held that:

The Secretarial Guidelines also require that a component’s management plan state the *kinds and amounts* of public use which the river area *can sustain* without impact to the values for which it was designated[,] and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features.

331. The USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and is in violation of the principles and practices of the recreation resource planning profession.

332. The *Environmental Analysis: Managing Recreation Uses on the Upper Chattooga River* (USDA Forest Service, August 2009) (EA) fails the test of adequacy on several fronts.

333. Visitor capacity is not adequately addressed in the EA, even in light of the compelling and convincing requirement to do so contained within the law, the EA and a 4-year “visitor capacity analysis” effort in response to the 2005 Decision of Appeal;

334. In the EA, the USFS, in addressing boating capacity, was inconsistent, illogical, erratic, incomplete, and incongruous in all of the eight alternatives, and failed completely to address capacities for the other significant recreation activities identified in the EA in any of the eight alternatives;

335. A reasonable range of alternatives, including visitor capacities, were not considered and fully analyzed. Visitor capacities have to be expressed in numbers. A capacity is a maximum number of people. No range of visitor capacity alternatives were offered for recreation activities.

336. The USFS Region and Forest was tasked “with finding the right balance” and to “find an appropriate mix of recreation uses.” Addressing visitor capacity is central to this task, and thus, the USFS failed to fulfill its legal and regulatory requirements.

337. Today, it is more socially acceptable to refer to the public as visitors rather than users, and thus, the phrase “visitor capacity” has replaced the phrase “user capacity” and are used interchangeably herein.

338. While there have been minor variations in the definition of visitor capacity over the past 40 years, the one enduring commonality is that a capacity is a maximum number of people.



339. A visitor capacity can be defined as the prescribed *number(s)* of recreation opportunities that will be accommodated based upon an area's approved comprehensive management prescription (i.e., the area's goal, objectives, desired future conditions, desired recreation experiences, planned management actions and regulations, quality standards, and budget).

340. Visitor capacities are (a) typically set for the important and significant recreation activities in a setting, (b) refer to the maximum number of people or groups at one time that is consistent with achieving an area's prescription, and (c) will generally vary across times of the year and across locations within a setting. The procedural standard for visitor capacity decision making is a legally-sufficient integrated and comprehensive public planning process, while the substantive standard for visitor capacity decision making is sound professional judgment.

341. The EA is virtually silent on the issue of visitor capacity.

342. The EA does not adequately address visitor capacity for the upper Chattooga as directed by the Wild and Scenic River Act, even with the benefit of a 4-year "visitor use capacity analysis."

343. The USFS EA does not define the appropriate kinds and amount of public use that can be sustained in the Chattooga River corridor, and is therefore does not contain a user capacity analysis.

**7. The USFS Failed to Adequately Address Floating in the Wilderness in the 2009 Amendment to the 2004 plan.**

344. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

345. The USFS virtually bans non-commercial, hand-powered floating on the 5.2 miles of Chattooga River that traverses protected wilderness.

346. Meanwhile, the USFS promotes continued access to the Ellicott Rock Wilderness for hikers, backpackers, campers and anglers in unlimited numbers.

347. Hikers, backpackers, campers, and anglers have greater impacts on wilderness than do non-commercial, hand-powered boaters.

348. The USFS improperly adopts a non-sustainable approach to use management of wilderness by promoting higher impact uses over lower impact uses.

349. The USFS virtual ban on primitive boating in the Ellicott Rock Wilderness ignores a primary mandate for administration of wilderness: that it be devoted to recreational use.

350. The Wilderness Act provides that wilderness areas “shall be administered...in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” 16 U.S.C. § 1131(a)

351. “Wilderness” is defined as “an area of undeveloped Federal land ... which is protected and *managed so as to preserve its natural conditions...*” 16 U.S.C. § 1131(c) (emphasis added).

352. The Wilderness Act charges the managing agency to “preserve its wilderness character.” 16 U.S.C. § 1133(b).

353. The USFS Amendment #1 to the Revised Land and Resource Management Plan for the Upper Chattooga River proposes to allow an average of *only 6 days* of non-commercial, hand-powered floating recreation on the section of Chattooga River within the Ellicott Rock Wilderness.

354. The Revised Land and Resource Management Plan decision to essentially ban boating in this area violates the Wilderness Act by imposing a virtual moratorium on a form of primitive wilderness recreation that the Forest Service is commanded to protect and enhance.

355. The Revised Land and Resource Management Plan allocation of uses in the Ellicott Rock Wilderness undermines the primary purpose of the Wilderness Act and related Forest Service regulations by promoting higher-impact uses over lower-impact uses.

356. Congress enacted the Wilderness Act “to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions ....” 16 U.S.C. § 1131(a).

357. The Wilderness Act established a National Wilderness Preservation System composed of “wilderness areas” which are “administered for the *use and enjoyment of the American people* in such manner as will leave them unimpaired for future use and enjoyment as wilderness ....” *Id* (emphasis added).

358. The Wilderness Act defines wilderness “in contrast with those areas where man and his own works dominate the landscape, ... as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c).

359. The purposes of the Wilderness Act supplement the purposes for which national forests are established and administered. *See* 16 U.S.C. § 1133(a).

360. Under the Wilderness Act, an agency charged with administering a designated wilderness area is responsible for preserving its wilderness character. *See* 16 U.S.C. § 1133(b).

361. Wilderness areas must be “devoted to the public purposes of *recreational*, scenic, scientific, educational, conservation and historical use.” 16 U.S.C. § 1133(b) (emphasis added).

362. Preserving outdoor recreation opportunities in wild areas was a major impetus behind passage of the wilderness legislation.

363. In keeping with this purpose, the language of the Wilderness Act makes clear that recreational uses are to be encouraged and permitted within wilderness areas so long as such uses do not threaten the natural condition of the area for future generations.

364. The Wilderness Act describes “wilderness” as an area that is “managed so as to preserve its natural conditions;” and which has “outstanding opportunities for ... a primitive and unconfined type of recreation.” 16 U.S.C. § 1131(c).

365. Banning non-motorized boating in the wilderness area through which the upper Chattooga flows contravenes the stated purposes and administrative mandates of the Wilderness Act.

366. Congress protected wilderness areas for the “use and enjoyment of the American people,” not for the use and enjoyment of particular user groups to the exclusion of others.

367. The USFS suggests that boating should not be permitted in the Ellicott Rock Wilderness because it might disturb anglers.

368. Unless a documented need for wilderness preservation is the basis, discriminating against user groups runs contrary to Congress’s intent to protect these treasured areas for the benefit of all wilderness compliant forms of recreation.

369. The USFS floating ban is not based on any threat to wilderness preservation.

370. The floating ban is based upon an untested suggestion that some users “might” be upset if a “new” user group is introduced into the wilderness.

371. The prediction that some users will not want to share simply does not justify ignoring the intent of Congress to make wilderness available to all Americans. Floating is not a “new” use; it has occurred on this WSR for more than 250 years.

372. When defining “wilderness” under the Wilderness Act, Congress contemplated the very type of use Plaintiffs seek here. “Wilderness” is defined as an area “where man himself is a visitor who does not remain.”

373. Kayakers and canoeists seek access to float from an existing upstream put-in, through the Ellicott Rock Wilderness, to an existing take-out point downstream of the wilderness.

374. This low impact activity will take place in less than a single day. In other words, paddlers seek to enjoy a primitive area in which they will be visitors who do not remain—a use that not only comports with, but helps define wilderness.

375. The Wilderness Act also describes wilderness as those areas with “outstanding opportunities for ... a primitive and unconfined type of recreation.”

376. Thus as a primitive recreation opportunity, floating is wholly consistent with, and actually incorporated into, the Wilderness Act’s definition of wilderness.

377. Primitive boating must be permitted in the Ellicott Rock Wilderness absent clear proof that wilderness preservation would be jeopardized.

378. A management decision that favors higher-impact uses over lower-impact uses is inconsistent with the Wilderness Act.

379. Favoring higher impact uses over lower impact uses undermines the goal of wilderness preservation, which is to preserve (*i.e.*, lessen impact on) the wilderness characteristics of a protected area.

380. The USFS should allow non-commercial, hand-powered boating in the Ellicott Rock Wilderness at least to the extent it allows other higher impact uses.

381. The Chattooga River only flows through one wilderness area: the Ellicott Rock Wilderness.

382. Paddlers seek access to the Ellicott Rock Wilderness in order to enjoy its scenery and the high quality whitewater boating.

383. While nominally addressing encounter standards and use limits, the USFS's preferred alternative *artificially increases* recreational use by supporting the stocking of trout adjacent to a Wilderness area and in a Wild and Scenic River, while banning natural floating use.

384. In the EA, the USFS admits that "[t]he angling trends on the Chattooga also depend on stocking and regulation stability." The agency has reported that they support the *stocking of over 70,000 exotic game fish* annually in the Upper Chattooga River to artificially increase recreational use. *Shelby and Whittaker* p. 19.

385. At the same time as this environmentally harmful stocking program occurs, the USFS has virtually banned floating, thereby decreasing recreational use in the Wilderness area.

386. In a Wilderness area on a Wild and Scenic River, natural conditions should prevail. The upper Chattooga River naturally provides high quality boating opportunities during times of high flow and a moderate quality angling experience at low flows.

387. There is no justification in the EA for artificially increasing the angling experience while effectively banning another wilderness use, floating.

388. The most Wilderness compliant alternative would have a natural balance of boating and angling – without conflict, with little recreational overlap, and without the collateral impacts of stocking exotic game fish.

**G. The USFS Failed to Treat All Users Equally as Required by the Chief's Decision and applicable laws.**

389. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

390. The upper Chattooga is a section of a public river that Congress required the USFS to protect and enhance for the benefit of all Americans who wish to engage in primitive recreational activities. Yet members of the public who would like to float the upper Chattooga are the only class of persons to be singled out and denied access to the upper Chattooga.

391. The USFS offers no rational basis for discriminatorily denying access only to this class of primitive recreationists. However the USFS explicitly admits that the ban is to benefit another group of *equal* standing – anglers.

392. The Decision on American Whitewater's appeal confirms that if use is to be limited it must be limited equitably. The EA, the alternatives, and the preferred alternative are not equitable. Each alternative proposes to radically limit or ban paddling use while other uses are virtually unlimited.

393. The USFS preferred alternative is to allow only six days of boating on one small stretch of the Headwaters, but even admits that only three of the six days would actually be available to paddlers. *Shelby and Whittaker* 2007, p. 36-37. Three days of paddling versus 365 days for other uses is not equitable.

394. The USFS has instituted the harshest possible management on one Wilderness Compliant use – a total ban on much of the river – while allowing all other uses unlimited access.

395. Only members of the floating public are required to receive advance permission to access the Headwaters. Putting the decision-making on whether the water is suitable to float on

a government official will reduce boating opportunities (below the three days granted by the USFS), reduce safety, discourage use, slow permitting, and cause government waste. This practice is not conducted on any other river in the Nation.

396. No other user group is required to wait for last minute permission to recreate on the Upper Chattooga River.

397. Appendix B of the EA asserts that boaters *may* have to pay fees to access the Upper Chattooga River through the commercial website Recreation.gov. This website is an online reservation service used for camping in designated campgrounds and other resource intensive overnight-use management.

398. No other user group—hikers, swimmers, backpackers, anglers, hunters, and other users—is or will be required to pay a fee to engage in their chosen form of backcountry travel. Only paddlers will have to pay to use the river.

399. Appendix B of the EA asserts that boaters may have to use the commercial website Recreation.gov prior to accessing the upper Chattooga River. This website is an online reservation system.

400. No other user group has to register online prior to visiting and traveling in the Upper Chattooga watershed.

401. The USFS has decided to limit paddling to the three winter months of December, January, and February, while all other uses are allowed year round.

402. Winter days are often cold and they are short, both of which potentially increase the difficulty of floating in the Winter and decrease the enjoyment.

403. While Winter boating in the Southeast is common, no other user group is restricted to using any section of the Chattooga at the least optimal time of year.



404. The USFS has decided to allow a miniscule amount of paddling on a small section of the river, while existing user groups have unlimited access to the entire river corridor. Specifically floating can only occur on the Ellicott Rock Reach, and if they are willing to carry their boats 1.5 miles, floaters can enjoy part of the Chattooga Cliffs Reach.

405. Floating is completely banned on the upper half of the Chattooga Cliffs reach, the Rock Gorge, Nicholson Fields, and all tributaries. Floating is a place-based activity, and banning a large section of a Wild and Scenic River has a significant impact on paddlers.

406. The USFS has decided to only allow paddling to occur at rare high flows over 450 cfs, while no other user group is limited by flow. People are permitted to swim and fish on the entire length of the Chattooga regardless of the rate of flow.

407. This flow constraint eliminates the opportunity to enjoy moderate flow days which many members of the floating community find less challenging and more enjoyable. In fact, according to Shelby and Whittaker this plan eliminates one third of the optimal paddling flow range and all of the technical boating opportunities.

408. The USFS did not collect, refer to or rely on any scientific or empirical data to demonstrate that flow rates of 450 cfs and above provide a suitable floating experience. No such data exists.

409. The effect of the flow and seasonal limits imposed by the USFS is that an average of 6 days annually will be hydrologically viable for paddling, but only three of those days will likely be usable based on hydrologic complexity. *See* Shelby and Whittaker (2007).

410. While paddlers are given three days to recreate, all other users are given 365 days.

411. Due to the flow and seasonal restriction imposed on boaters by the USFS, every boater who wished to paddle the middle one third of the upper Chattooga (the only section of the

upper Chattooga where boating is not completely banned) will be forced to do so during three days. All other user groups are permitted to use the entire river on any day of the year.

412. The chance that a significant number of paddlers will descend the river in a single day and possibly inadvertently violate standards is greatly increased by this arbitrary and capricious and illegal management choice. The USFS confirms that:

However, alternatives 4 and 8 propose an “adaptive management” component that could use registration, monitoring or surveys to determine the need for implementation of additional use restrictions.

413. Not only will the USFS consider additional use restrictions; the USFS will also single out paddlers for additional unique restrictions. Specifically, one of the monitoring questions the USFS intends to pursue is:

Above Highway 28 is the solitude component of the recreation ORV being maintained? Are the encounter levels within established desires and estimates? Has the experience of historical recreation users been diminished due to the introduction of boating?

414. The USFS has created conditions that encourage relatively large numbers of paddlers to descend on a small portion of the river in a very small three day window. The USFS will then monitor this use and hold paddlers to a unique and biased standard.

415. The USFS is setting up paddling to fail on the Upper Chattooga.

416. The USFS has decided to limit all existing users indirectly only after standards are violated, and to limit paddlers directly immediately, prior to any standard violations.

417. Specifically, the USFS is immediately completely banning paddling on most of the upper river, and is requiring permits and harsh seasonal and flow limits where paddling is allowed.

418. On the other hand, existing users have no limits whatsoever until encounter standards are violated on 20% of days. This is a clear violation of USFS policy.

419. The USFS will judge the acceptability of existing use, based on encounter standards being violated less than 20% of days annually. Paddlers must meet a much more stringent standard.

420. Without actual visitor capacity numbers, so-called “encounter standards” are meaningless and are prone to grossly subjective enforcement terms.

421. Paddlers will be judged based on their impacts on the “solitude” of the USFS preferred user type, on whether or not the “experience of historical recreation users has been diminished,” and on monitoring of large woody debris and portage trail needs.

422. Judging paddlers by different standards is not equitable, especially when the standards that could lead to elimination of paddling are based on nothing more than the opinions of existing user groups that vehemently oppose paddling access.

423. The USFS is managing the potential biophysical impacts of paddling and other uses in totally different ways.

424. The potential impacts of paddlers are managed by banning the use entirely, before an impact even could potentially occur, and without justification.

425. The proven and significant impacts of other uses are appropriately managed through technical fixes. The USFS EA confirms that technical fixes are the appropriate way to manage biophysical impacts.

426. The Biophysical impacts are not typically addressed through use/encounter limits, but through “technical fixes” (e.g.: campsite hardening/ rehabilitation/obliteration, trail reconstruction/realignment/ obliteration, etc.) or through education and regulation.

427. By managing the similar impacts for different user groups in different ways that are discriminatory towards one group, the USFS has failed to act equitably and its actions are arbitrary and capricious.

428. Based on the use limitations described above, the USFS has determined that most of the upper Chattooga River has a capacity of zero paddlers, and the remaining section has a capacity that is extremely close to zero.

429. In essence, the agency claims that one paddler descending the river would cause unacceptable and significant impacts.

430. At the same time USFS has failed to establish a single capacity for any other use, which is analogous to claiming a capacity of infinite other users. While others hike, fish and swim in the Headwaters in unlimited numbers, the USFS claims a single paddler would have impacts so severe a total ban is justified.

431. The EA reports that natural flow alone adequately separates user groups on the Chattooga, as they do on every other river in the region.

432. The study results show that paddlers and anglers prefer different flows. There is simply too little water to navigate the river when angling is really good, and too much water to fish when boating is really good.

433. Flows alone separate uses. Specifically, there are only 34 days each year when flows are optimal for boating (i.e. 350-650 cfs), and paddlers will only be able to use half (17) of those.

434. On those days angling is “Lower Quality.” Based on the USFS goal of protecting “High Quality” angling, even if you accept their erroneous argument that a few, random

encounters with paddlers would ruin a day of fishing, they have no basis (or need) whatsoever for limiting boating at flows over 350 cfs.

435. The USFS has never explained why the simplest, cheapest, fairest, most common, and easiest to manage solution – allowing flows alone to passively separate uses – is not acceptable. Flows alone support high quality angling and paddling, and adequately separate uses.

436. The USFS clearly finds that encounter standards are already exceeded by existing users yet proposed no mitigation for these impacts.

437. Conversely, the USFS chose to initiate limits on non-boating uses when encounter violations reach 20% of days (73 days). That decision is both arbitrary and a clear sign that they do not wish to curtail existing impacts.

438. The EA readily admits that “the encounter limits established [described in alternative 8] for the Ellicott Rock Wilderness are closer to the desired tolerances in the literature (Whittaker and Shelby 2007) when compared to alternatives 3-5. The USFS decision to limit paddlers based on encounters that have not occurred and will never reach 20% is arbitrary and capricious.

439. To ban paddling, which has virtually no effects on encounter standard violations when allowed in unlimited numbers (like all other uses), while allowing uses with significant encounter standard violations to remain unlimited is absolutely inequitable and capricious.

440. The USFS has instituted paddling limitations as the sole direct management tool, while all other larger and more damaging uses are allowed in every location, in every time, in unlimited numbers, in every alternative that allows paddling.

441. Paddling is anticipated to be the smallest and lowest impact use on the river, and it is unreasonable to manage environmental or social impacts by directly managing only the smallest and lowest impact use.

442. USFS estimates in Shelby and Whittaker 2007 and in Upper Chattooga River Visitor Capacity Analysis Data Collection Reports concluded that unlimited paddling would make up roughly 2% of total use.

443. The EA fails to document a single impact of paddling on the river resource.

444. While it may be true that additional boaters may have increasing impacts, the USFS admits that so too will increasing numbers of hikers, anglers, and campers.

445. The USFS concedes that non-boaters cause significant residual impacts on the Headwaters.

446. Since non-boating use causes significant impacts, the USFS must analyze the effects of all recreationists on the corridor, and propose limits that address all of these factors.

447. The USFS EA indicates that some recreational impacts are acceptable because recreation is generally good for society – except apparently floating. This double standard permeates the EA and is arbitrary and capricious.

448. The EA shows that boating is be the slowest growing use on the Chattooga Headwaters:

- Angling is expected to grow and has recently grown.
- Day hiking in the South will increase by about 48% by 2020.
- Backpacking in the South will increase about 23% by 2020.
- Whitewater boating is flat or declining on Chattooga and Nationally.

449. By harshly managing the smallest and slowest growing use while allowing all other uses unlimited access the USFS is acting arbitrarily and capriciously.

450. The USFS clearly values the solitude of anglers higher than the solitude - or even the ability to experience the river at all - of paddlers.

451. The inequitable allocation of solitude to anglers seems to be the primary reason behind the Defendants' decision to ban floating.

452. The EA concedes that even where paddling use is unlimited, solitude for all users remains intact.

453. The agency has elected to limit floating to protect anglers' solitude when an alternative with no paddling limits (on the sections considered by the USFS) was found to maintain outstanding opportunities for solitude. Both of these aspects of the USFS decision are arbitrary and capricious.

454. The EA suggests that the USFS rejected the potential permit system in alternative 2 (which proposed permits for all users) because use limit systems require administrative effort, require users to plan ahead and compete for limited permits, and would displace some proportion of existing use on high use days.

455. If this is sufficient justification to eliminate alternative 2, it should be sufficient justification to eliminate the selected alternative and others that would require permits for paddlers.

456. The USFS manages thousands of whitewater rivers. By far the most common management of non-commercial floating is no management at all. To ban floating on the Chattooga Headwaters and nowhere else is inequitable, arbitrary and capricious.

457. The USFS has never banned boating to benefit anglers – except on the Chattooga.

458. On perhaps a few dozen rivers nationwide the USFS limits paddling by permit. In virtually all of these cases the rivers take several days to paddle, and the limits are designed to ensure campsites are available.

459. In virtually all of these cases, where permits are required, paddling is the largest use of the river corridor, and thus is the focus of management activities. In all of these cases paddling limits are designed to protect and enhance the paddling experience.

460. The upper Chattooga is mainly a day-use river on which paddling will comprise a relatively tiny portion of the total use, and limits are therefore inconsistent with USFS practice.

461. Angling use on the Headwaters is largely artificial, but the USFS has arbitrarily selected angling as the exclusive use to protect and enhance on the upper Chattooga.

462. The quality of fishing on the upper Chattooga is created by the stocking of over 50,000 exotic trout a year by helicopter and trucks.

463. Stocking of non-indigenous fish has a detrimental effect on indigenous fish. *See* Bain Declaration filed with Motion for Temporary Restraining Order. The Bain Declaration is incorporated here in.

464. The artificial fishery is a primary determinant of the angling experience.

465. Floating, however, is a nature-based activity, which is dependent on only the natural condition of the upper Chattooga River.

466. It is inequitable and unlawful to manage for an artificial use to the exclusion of a nature based use on a Wild and Scenic River and in a Wilderness Area.

467. The USFS is managing for a user group that in this location claims zero tolerance of other uses.



468. Nowhere else in the Nation are anglers known to claim zero tolerance of paddlers on a Wild and Scenic River managed by the USFS.

469. The USFS even forbids other uses during conditions when anglers are not even recreating on the river.

470. The USFS is required by law to manage for compatible uses.

471. Wild and Scenic Rivers must be shared equitably among users.

472. Equitable, indirect, means of reducing fishing exist and should be used before a ban on floating can legally occur.

473. One example of an indirect means of limiting use focuses on fisheries management. Section 2323.34(a) of the USFS Manual cautions Wilderness managers to “recognize the probability of increased visitor use of stocked waters and their full impact and effect on the wilderness resource.”

474. Nevertheless, the USFS currently allows large scale stocking programs on the upper Chattooga. In addition to large scale stocking programs there is a year round season with large creel limits.

475. This stocking program, by design, attracts users to the river and increases recreational use of the Wilderness Area and the Wild and Scenic River corridor.

476. Altering the stocking patterns on the Chattooga River would clearly represent a passive and indirect method of limiting use and should be implemented prior to the banning or direct limiting of any other use.

477. USFS has ignored the massive impacts of industrial scale stocking and fish rearing on the upper Chattooga River, yet has banned floating. While the USFS makes much of

the “high quality angling experience,” they clearly fail to describe or value the high quality paddling experience that the upper Chattooga provides.

478. For individuals with the appropriate skills and experience, the upper Chattooga is a unique and incomparable whitewater river.

479. A USFS-sanctioned Headwaters float revealed a beautiful stream filled with world class rapids, stunning views, and an intimate and remote feel.

480. There are extremely few opportunities in the region to paddle a Wild and Scenic River, a river flowing through a Wilderness Area, or a river flowing through a Roadless Area. The upper Chattooga provides all three.

481. The upper Chattooga is a high quality and unique river for skilled floating, and denying any portion of this river to paddlers, while leaving it fully open to all other uses is inequitable and unjustified.

**H. The Forest Service Reliance on Unsubstantiated Possibility of User Conflicts is Arbitrary and Capricious, an Abuse of Discretion and Otherwise Contrary to Law**

482. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

483. The USFS failed to document any conflicts on the upper Chattooga between boaters and anglers, or any similar stream in the region.

484. The USFS erroneously contends that by establishing flow, season, and reach restrictions on boating, the high-quality trout fishing experience is maintained and potential conflicts are reduced.

485. The USFS has failed to prove that any amount of boating would have any impact whatsoever on trout fishing, or that there is any relationship whatsoever between boating and trout fishing quality.

486. USFS failed to show how flow, season, or reach restrictions on floating are needed to maintain high quality trout fishing.

487. USFS failed to show that banning floating would reduce conflicts even if conflicts did exist.

488. USFS has created a record that fully supports allowing boating, and its conclusion is simply not supported by the data.

489. Virtually all “creek boating” resources in the Southeast are also trout fishing resources (although the opposite is not true).

490. On these many other rivers, angling, paddling, and hiking coexist with no reports of any type of conflict.

491. The USFS failed to document a single angler-boater conflict occurring on the upper Chattooga or any similar stream in its EA.

492. Paddling and angling uses rarely overlap because of different flow preferences and when they do, this interaction is amicable.

493. Many “creek boaters” are also cold water anglers. Additionally, many cold water anglers prefer to fish from canoes and kayaks.

494. As on every other similar river in the southeast, anglers and paddlers can peacefully coexist on the upper Chattooga River.

495. If boating is allowed without direct limits, anglers will have an average of 305 days each year to enjoy the Chattooga River.

496. The majority of remaining 60 days will be low quality angling days due to high flows which make fishing more difficult and wading less safe, while at the same time offering favorable conditions for paddling.

497. The USFS has decided to impose limits on non-boating uses only if and when standards are exceeded, beginning with indirect limits. In the “Proposed Action” section of the EA the USFS states it will manage encounters for existing users using indirect measures, “Manage encounters among existing users by limiting trails, campsites, group size and parking.”

498. The Proposed Action then recites a litany of direct measures *on boaters only* that they will use to limit encounters. “Manage encounters among users by establishing zone, season, group size restrictions and flow limits (including prohibition in some alternatives) on boating opportunities.”

499. In all proposed USFS management alternatives (except for some reaches in Alternative 8), the USFS imposed direct limits on paddlers before any standards were exceeded. However all other users have unlimited access until standards are exceeded to an unacceptable level. This is arbitrary and capricious.

500. Boaters are the only user group that travels through the river corridor on the river itself. All other user groups travel primarily on trails and therefore interact with each other far more than they would interact with boaters.

**I. The 2009 Amendment, Without Notice, Bans Floating on Tributaries of the Upper Chattooga.**

501. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

502. The USFS arbitrarily and capriciously decided to ban paddling on all tributaries of the Upper Chattooga River.

503. The USFS offered unfounded “concerns” as a justification for its failure to study the tributaries.

504. This is a new prohibition on paddling, made without any significant analysis.

505. The USFS erroneously believes that the tributaries to the Upper Chattooga River are currently banned to boating. The 1986 Sumter National Forest Plan, which currently dictates the management of the river, states:

Use patterns have stabilized on the river, although use continues to rise. Floating is limited to the 26 mile portion below Highway 28 Bridge and the West Fork's lower 4 miles in Georgia.

506. The plan contains no mention of tributaries of the Chattooga River or its West Fork. The quote above refers to "*the river*," not the tributaries of the river. Because the tributaries are not explicitly banned to boating, they are thus open to paddling as is every other stream in the region.

507. Several of these tributary streams are viable paddling resources, albeit rarely available based on the high flows required for recreational enjoyment. Banning a recreational use is a major federal action requiring analysis under NEPA and compliance with the APA.

**J. There is no Rational Basis for Selecting 450 Cubic Feet Per Second (cfs) as a Flow Below Which No Floating Shall Occur.**

508. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

509. The 2009 Amendment in the EA bans boating on several reaches and only allows boating on one reach if flows are above 450 cfs. There is no rational nor articulated basis for the selection of that flow.

510. The selection of 450 cfs as a cut off eliminates many optimal boating opportunities (that are not optimal angling flows), and forces paddlers to run the river at higher flows which some paddlers may not prefer.

511. Flows between 350 and 450 cfs for example offer *optimal* boating and *unacceptable* fly fishing. Shelby and Whittaker state that:

For many days in the “high overlap” period [350-650 cfs], boater-angler conflict and related capacity problems would be unlikely. These are lower quality angling days for all but bait anglers, and they tend to occur in winter when bait angling use is low. Some fly and spin anglers certainly fish these flows...but they have lower quality conditions in comparison to the other 320 days per year that they have lower flows.

512. However, the EA states that “At these overlap flows [referring to all overlap – both high and low] some users of each group could be present (if boating were allowed) and encounters could create impacts and conflict.”

513. Whittaker and Shelby 2007 conclude that if any management of boating and angling would be acceptable, it would be required during the “low overlap” period between 225-350 cfs.

514. There is no scientific basis in the record for boating (or angling) limits based on a 450 cfs cut-off, or above 350 cfs. Thus the preferred alternative is arbitrary and capricious.

515. In addition, the EA provides that “450 cfs is near the bottom end (within 100 cfs) of the optimal range for whitewater boating opportunities,” while in fact, the bottom end of the optimal flow range for standard boating is estimated to be at or below 350cfs.

516. In this context, 350 is not “near” 450. The difference makes an enormous difference in the number of boating opportunities and is extremely significant for paddlers.

517. Even when suggesting an alternative that would provide a miniscule amount of time where boating can occur, the Forest Service has unlawfully treated paddlers unequally by selecting a flow rate that is at the highest end of the range where fishing can comfortably take place, yet well above the low end of the flow rate where optimal boating can occur.

518. The USFS acknowledges that the procedure for allowing the minimum boating on one stretch depends on their staff somehow predicting a boatable day that will then be made available for paddling use. The USFS States: “A new gauge at Burrells Ford would be used to

help the Forest Service to declare a boatable day. (*See* Appendix C).” EA 29. The notion that one or more USFS officials will have the job of watching weather reports and stream gauges and then announcing a legal day of paddling is unrealistic.

519. Like many southern Appalachian streams, the upper Chattooga River is a flashy and unpredictable watershed. Paddlers make their own last minute decisions about where and when to paddle. Shelby and Whittaker 2007. 84-85.

**K. The 2009 Amendment is Inconsistent with USFS Policy and Precedent**

520. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

521. The USFS decision on the Chattooga flies in the face of precedent and accepted principles of river management.

522. River managers strive to provide the public with high quality non-motorized recreation experiences of all types.

523. River managers do not single out a single user group for management preference, and they do not limit uses unless absolutely necessary.

524. The USFS likely manages thousands of headwater streams. Virtually all of them are paddled and fished.

525. Nowhere in the United States, other than under Amendment 1 to the Revised Land and Resource Management Plan for the Chattooga, does the USFS:

- Ban non-commercial paddling (except one unboatable gorge in Oregon)
- Limit non-commercial paddling to certain moderate and high flow ranges
- Limit non-commercial paddling to certain seasons
- Require advance online reservations for any day-use.
- Require a fee merely to paddle (as opposed to access) a river

526. On no headwater stream in the entire region does the USFS impose any limit whatsoever on noncommercial floating. This is simply because floating steep headwater streams is a small and low-impact use that the agency supports everywhere but the Chattooga.

527. In the western United States on some large, high-demand rivers the USFS requires that paddlers acquire limited permits to ensure that the paddling experience remains high quality and that camping capacity is not exceeded. Those are not issues that were identified by the Forest Service in the Chattooga EA.

528. The paddling community broadly supports these policies. In those instances other uses typically do not have to acquire a permit because other uses are relatively much smaller and not in competition for the same resources.

529. On the Chattooga, boating is anticipated to be the smallest use and will not be in competition for resources with other visitors, therefore no unique boating limits are justified.

530. The discriminatory boating ban on the Chattooga is an unsupported, arbitrary and capricious management anomaly.

531. In four years of analysis the USFS failed to document a single biophysical impact of paddling, a single conflict, or that paddling would in any way cause the loss of the angling experience.

**L. The 2009 Amendment Offers No Rationale for Allowing Boating Only In The Winter**

532. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

533. The EA offers no rationale or justification for allowing paddling only in the winter in certain alternatives. Winter days are shorter and colder, making them less desirable for paddling trips.



534. The EA finds that:

Angler/boater encounters are more likely to occur in the winter months (December through February) when both groups are on the river in the middle of the day. As the weather warms by mid-March and April, boating concentrated in the middle of the day would likely produce relatively fewer boater/angler encounters as anglers are more likely to fish in the early morning before temperatures rise (Whittaker and Shelby 2007)

535. Thus, selecting an alternative that allows paddling only in the winter and not during the rest of the year with the aim of reducing encounters is arbitrary and capricious.

536. The 2009 Amendment violates the requirements of NEPA.

537. Plaintiffs incorporate the allegations set forth in the others parts of this Complaint as if fully set forth herein.

538. Under NEPA, the court must ensure that agency decision makers have taken the requisite “hard look” at the environmental consequences of its proposed action and that the agency decision is founded on a reasoned evaluation of the relevant factors.

539. In reviewing whether an agency’s decision complies with NEPA, a reviewing court must ultimately employ two criteria: it must decide (a) whether the agency in “good faith objectivity” has taken the required “hard look” at the alternatives; and (b) whether the discussion is detailed enough to permit those who did not participate in its preparation to understand and consider meaningfully the reasoning, premises, and data relied upon, and to permit a reasoned choice among different courses of action.

540. USFS decisions like the 2009 Amendment to the 2004 RLRMP must take a “hard look” at the environmental consequences of the proposed use and apply a “rule of reason.”

541. To take the requisite “hard look” agencies must consider and include some quantified or detailed information, otherwise, neither the courts nor the public, in reviewing the

Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.

542. In particular, general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.

543. In the 2009 Amendment, just as in the 2004 RLRMP, the USFS makes vague, unsubstantiated statements about 'possible' effects without providing any hard evidence that impacts have or would occur.

544. The USFS took *4.5 years* to amend the illegal boating ban and failed to document a single impact of boating. Without offering any hard data to support its conclusions — and including unsubstantiated statements about 'possible effects' and in place of hard data—the USFS fails to take the requisite "hard look" at recreational use on the upper Chattooga River. The USFS has violated NEPA.

545. In addition, the NEPA's implementing regulations require agencies to *rigorously explore* and *objectively evaluate* all reasonable alternatives.

546. The USFS wholly failed to analyze reasonable alternatives that were in compliance with federal law. The USFS proposed alternatives leading up to the 2009 Amendment were fundamentally flawed, including in the following ways:

- No alternative proposes a capacity for uses
- No alternative analyzed allowing boating or any other form of recreation immediately below Grimshawes Bridge adjacent to private lands.
- No alternative analyzed banning boating on tributaries of the upper Chattooga River

- No alternative protects or enhances boating
- No alternative bans any use except boating.
- No alternative treated exiting uses and boating equitably
- No alternative considered immediately directly limited existing users
- No alternative considers the role of stocking exotic trout
- All alternatives immediately directly limit boating

547. By failing to consider reasonable alternatives and by failing to provide any scientific evidence to support the boating ban, the USFS's 2009 Amendment violates NEPA.

**M. Incorporation of Pleadings and Exhibits from Motion for Temporary Restraining Order and Preliminary Injunction**

548. Plaintiff Incorporates into this Complaint all pleadings and exhibits filed with Motion for Temporary Restraining Order and Preliminary Injunction. The declarations, affidavits, and associated exhibits are incorporated here in.

**V. REQUESTED RELIEF**

549. Plaintiffs allege again each and every allegation in the preceding paragraphs as though set forth in full here.

550. Plaintiffs respectfully request this Court to issue a Temporary Restraining Order and Preliminary Injunction ordering Defendants to cease their unlawful ban on recreational floating of the Headwaters of the Chattooga Wild and Scenic River.

551. Plaintiffs further request that this Court issue a Temporary Restraining Order and Preliminary Injunction ordering Defendants to withdraw any portions of the Forest Management Plans for the three National Forests that implement a ban of any kind on primitive floating.

October 14, 2009;  
Greenville, South Carolina

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/s/ J. Nathan Galbreath

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**ATTORNEYS FOR PLAINTIFFS**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION**

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AMERICAN WHITEWATER, AMERICAN  
CANOE ASSOCIATION, GEORGIA CANOEING  
ASSOCIATION, ATLANTA WHITEWATER  
CLUB, FOOTHILLS PADDLING CLUB,  
WESTERN CAROLINA PADDLERS, Joseph C.  
STUBBS, Kenneth L. STRICKLAND, and Bruce A.  
HARE,

Plaintiffs,

v.

THOMAS TIDWELL, in his official capacity as  
Chief of the United States Forest Service; the  
UNITED STATES FOREST SERVICE, an agency  
of the United States Department of Agriculture;  
ELIZABETH AGPAOA, Regional Forester,  
Southern Region, United States Forest Service;  
MONICA J. SCHWALBACH, Acting Forest  
Supervisor, Francis Marion and Sumter National  
Forests; MARISUE HILLIARD, Forest Supervisor,  
National Forests in North Carolina; GEORGE M.  
BAIN, Forest Supervisor, Chattahoochee-Oconee  
National Forests; THOMAS VILSACK, in his  
official capacity as Secretary of the United States  
Department of Agriculture; the UNITED STATES  
DEPARTMENT OF AGRICULTURE,

Defendants.

Civil Action No. \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

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I hereby certify that, on this 14th day of October, 2009, copies of the foregoing **PLAINTIFFS' COMPLAINT, CIVIL COVER SHEET, AFFIDAVIT OF BRUCE HARE, AFFIDAVIT OF JOSEPH STUBBS, AFFIDAVIT OF KENNETH STRICKLAND; ANSWER TO L.R. 26.01 INTERROGATORIES; CORPORATE DISCLOSURE STATEMENT, MOTION FOR TEMPORARY RESTRAINING ORDER and PRELIMINARY INJUNCTION, MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, DECLARATIONS OF DONALD KINSER, KEVIN COLBURN, DONALD HAAS and MARK BAIN IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRO HAC VICE APPLICATION FOR JOHN D. AUSTIN, JR and APPLICATION FOR PRO HAC VICE ADMISSION OF R. BRIAN HENDRIX**

**VIA HAND DELIVERY**

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